IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] /2

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC, JEAN NEBBIA and ANTHONY SUTERA,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF AND APPENDICES FOR PETITIONERS

ABRAHAM GLASSER,
52 Eighth Avenue,
New York, N.Y.
DAVID M. MARKOWITZ,
261 Broadway
New York, N.Y.
Attorneys for Petitioners Dioguardi and Sutera

JEAN CLAUDE LEFRANC,
Petitioner Pro Se.

ARNOLD C. STREAM,
660 Madison Avenue,
New York, N.Y.
Attorney for Petitioner Nebbia

IRVING YOUNGER,
40 Washington Square South
New York, N.Y.
Attorney for Petitioner Desist

ABRAHAM GLASSER,
of Counsel

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—ORegon 5-4540

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AUTHORITIES

Cases

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Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

JOINT BRIEF FOR PETITIONERS*

Opinions Below

The opinion of the Court of Appeals affirming the convictions of the petitioners is reported in 384 F. 2d 889. The

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* Argument of this case was at first ordered to be accelerated, then argument was re-scheduled for the next Term. The Clerk advised counsel by letter of March 14, 1968 that the Chief Justice had approved a proposal that the case be presented on the basis of the record certified by the lower Court. Accordingly, petitioners have not printed an appendix in this Court under Rule 36; but see the appendices to this brief, *infra*. The certified record includes a miscellany of items relating to electronic eavesdropping; for clarity of reference to these items, we think it best to cite them in each instance *infra* by suitable descriptions rather than by bare "record" page references.

Also, we find in checking back on our copy of the listing by the Clerk of the Court below as to the contents of the certified record, that it is not clear whether all of the items in the record relating to electronic eavesdropping were actually included by that Clerk in the record as certified to this Court at the time of the filing of our petition for certiorari. Our belated recognition of this uncertainty as to the complete contents of the certified record is regretted; such uncertainty

opinion of the District Court after remand on issues of electronic eavesdropping is reported in 277 F. Supp. 690. Both of these opinions were printed as appendices to the joint petition for certiorari.

Jurisdiction

The judgment of the Court of Appeals was entered on October 13, 1967 (Pet. Cert. App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The order granting certiorari is dated March 4, 1968.

Questions Presented*

Petitioners were convicted of narcotics conspiracy. The Government has fought throughout this case to vindicate

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probably would not have occurred but for the pressures of the former accelerated schedule herein and the fact that the Clerk of the Court below had the certified record transmitted to this Court in sealed packages whose contents we could not examine. We do know, and we assure the Court, that in ordering the certified record from the Clerk of the Court below we were absolutely explicit in requesting that each and every item in the file or record be certified. Promptly after serving and filing this brief we shall examine the certified record in the office of the Clerk of this Court, and if any record item cited in this brief is found to be not contained in the certified record, we shall move for supplemental certification or shall take whatever other step the Clerk may advise; we trust that the Government will not be inconvenienced in this regard because we assume that the Government has a complete file of this case.

It should be noted also that in including petitioner LeFranc on this brief *pro se,* we are adhering to the position stated in the joint petition for certiorari herein, pp. 1-2, fn.

* Having in mind the requirement that the "Questions Presented" on which certiorari is granted control the substance of the "Questions Presented" in a brief on the merits, we must note that of necessity some re-wording of the questions must be done here because of the supervening decision in *Katz* v. *United States,* No. 35 this Term, which was decided after our petition for certiorari was filed and before it was granted.

its use of certain electronic eavesdropping (at the Waldorf Astoria Hotel in New York City) without which, concededly, the case could not have been developed in its present prosecutive framework. Now, since the decision in *Katz* v. *United States,* No. 35 this Term, whose principle the Government concedes would preclude affirmance of petitioners' convictions, the Government's effort to save the convictions is being concentrated on the contention that *Katz* should not be applied to prior cases. However, we contend that even if *Katz* does not "retroactively" apply to this case, the Waldorf-Astoria eavesdropping was unconstitutional by pre-*Katz* standards as to "trespassory" electronic "bugging"; and in any event there are questions as to the due process adequacy of the proceedings in both of the Courts below which resulted in findings that the Waldorf-Astoria bugging was not trespassory. Also, certain further conduct of the Government's representatives in this case took place which requires constitutional scrutiny both as to whether additional taint-productive eavesdropping was resorted to and as to whether the Narcotics Bureau Agents have thus far revealed the full truth on that subject as well as on the subject of the Waldorf-Astoria bugging; and, indeed, whether the United States Attorney's office has met its full constitutional obligation to cooperate in judicial exploration of those subjects; and whether, again, petitioners were afforded adequate due process adjudication in both of the Courts below as to such indicated further taint-productive eavesdropping especially in light of obstructive and evasive tactics of the Government's representatives. More systematically stated, the questions are:

1. Is the applying of the *Katz* principle to this case prevented by any policy of non-"retroactivity"?

2. Even if Question 1 is decided against petitioners, i.e., even if the Court holds that the *Katz* principle does not govern our case for some reason favoring "prospective" rather than "retroactive" application of *Katz,* should not the convictions nevertheless be vacated on the ground that the Waldorf Astoria bugging violated pre-*Katz* standards prohibiting "trespassory" or otherwise constitutionally forbidden physically penetrational or physically intrusive bugging? This question of the pre-*Katz* constitutionality of the Waldorf Astoria bugging needs to be considered on two factual alternatives presented by the record, *viz.,* either (a) that the Government's own description of how the Waldorf Astoria bugging was done from the physical or technological standpoint may be accepted as having been proved, or (b) that the Government's proofs concerning this should be rejected as probatively unsatisfactory. On either of these alternatives we urge that pre-*Katz* standards were violated. These two alternatives are amplified in the next two questions.

3. Accepting the Government's contention that the Waldorf Astoria bugging method used was the placing of a microphone at the bottom of a door inside the Agents' own room adjoining petitioner Nebbia's room, a procedure which the Government claims was patterned after and justified by that used in the pre-*Katz* case of *United States* v. *Pardo-Bolland,* 348 F. 2d 316 (C.A. 2, 1965), cert. denied 382 U.S. 944, 946, was not the instant Waldorf Astoria bugging decisively distinguishable in fact (and therefore in law) from that in *Pardo-Bolland,* (a) in that our case involved a double-door arrangement between adjoining hotel rooms whereas *Pardo-Bolland* involved a single-door barrier, so

that in our case there was actually a "trespassory" intrusion into the specially-provided (for added privacy) air space between the two doors, by reason of the admitted physical entry into that privacy-purposed air space by several of the Government's agents in preparing for the installation of the microphone; (b) also in that here the "bug", as a matter of incontestable technological fact, operated as a "parabolic mike" trespassorily operating upon, through and beyond the aforesaid air space; (c) also in that in our case the issue is expressly presented that the "bug" admittedly utilized the hotel electric current as its power source so that the common wiring system of the hotel, serving all the hotel's guests, was turned into a means for electronic spying; and (d) in that in our case the issue is expressly presented that the hotel management secretly connived with the Government to plant the Agents in the adjoining room desired by them for the electronic spying, thus betraying the trust of a hotel guest who relied on his host not to betray his privacy?

4. Question 3, above, posits that the Government's Agents told the truth about how they physically or technologically performed the Waldorf-Astoria bugging. But does not the record of the pre-trial hearing on this subject present grave questions as to the truthfulness of the Agents' testimony and the correctness of the trial Court's findings that the Waldorf Astoria bugging was done in the manner claimed by the Agents? And in view of further indications —which first emerged during the proceedings in the Court of Appeals—that the constitutionally required full and truthful disclosures of electronic spying in this case had not been and were not being willingly given by the Government,

does not the question of what the Agents actually did at the Waldorf Astoria become still more disturbing? And in that posture of the case before the Court of Appeals, does not the record present the following further grouping of questions: Should not the Court of Appeals have done more than it did to assist the petitioners in probing into the full facts of the electronic spying in this case? Petitioners having striven in the Court of Appeals over a period of several months (*via* a massive and numerous series of motions, etc. based on elaborately specific factual showings) to demonstrate that the Government was holding back relevant information about its electronic spying activities, the Government having at last reluctantly disgorged the information that two previously undisclosed trespassory buggings (in addition to the Waldorf-Astoria bug) had been perpetrated, and the Court of Appeals then having at last remanded the case for a hearing as to any electronic activity but expressly excluding from such remand the Waldorf-Astoria bug, should not the Court of Appeals have included in the remand a hearing on the Waldorf-Astoria bug as well? Was it justifiable to exclude the Waldorf-Astoria bug from the remand hearing solely because that issue had once been heard in the pre-trial hearing here involved? Was it constitutional, fair or rational to grant a remand for a new electronic eavesdrop hearing without including the Waldorf-Astoria bug, in the face of the relevations at last that the Government had so poor an appreciation of its own constitutional responsibilities of voluntary disclosure in this case, and above all in the face of our strongly-circumstantial demonstration in the Court of Appeals that the Narcotics Agents who testified at the pre-trial hearing concerning the technical methods of the Waldorf-

Astoria bug must almost surely have been testifying falsely, and that it was demonstrably a virtual technological certainty (*on the present record*) that the bug must have been of an outright trespassory character rather than of the "*Pardo-Bolland*" type?

5. Did both of the Courts below err in ruling that the Waldorf Astoria eavesdrop evidence was constitutionally admissible?

6. Aside from the Waldorf Astoria phase, were petitioners denied due process by the conduct of the Government and the rulings of both Courts below in regard to other electronic eavesdropping, the Government having belatedly admitted (at the appeal stage) two other trespassory buggings (which it claimed did not materially affect the convictions), the Court of Appeals having then remanded the case for a "full hearing" as to "these and other electronic eavesdrops of any kind which related to this case (except for the Waldorf monitoring * * *)", the Government then having made what we contend was a grossly insufficient explanation and disclosure in the ensuing remand hearing, petitioners despite these handicaps having then gone on to adduce sworn direct testimony in the remand hearing that Narcotics Agents had boasted of a successful trespassory automobile bugging in Georgia which helped to break this case, the District Court in the remand hearing then having rejected this evidence of ours on grounds of credibility and on the basis of such rejection having relieved the Government of any further burden of explanation or of going forward (even though no Agent or anyone else took the stand to deny our proof that Agents

had boasted as aforesaid), and both of the Courts below having concluded that the remand proceeding was procedurally adequate and had produced no showing "that any of the evidence used against [petitioners] at the trial was tainted by any invasion of their constitutional rights"?

7. Should not the Waldorf Astoria eavesdrop proofs have been excluded from evidence in any event because of the very poor probative quality of the tape recordings, which were in the French language, pervasively garbled and gapped, unsatisfactorily proved as to voice identification, and not satisfactorily translated for the jury by a fair due process translation procedure?

8. As to petitioners Dioguardi and Sutera, was the evidence sufficient to prove knowledge of illegal importation of narcotics?

9. As to petitioner Nebbia (and, by prejudicial overflow, as to the other petitioners) was there a denial of due process, right of confrontation, right to be present at one's own trial for crime, and effective assistance of counsel, by the refusal of the trial Court to provide Nebbia with an impartial, Court-appointed French interpreter qualified to render simultaneous translation for Nebbia's understanding of the proceedings, it being undisputed that Nebbia cannot understand or speak English?

10. Was the Government's seizure of the narcotics in Georgia done by unconstitutional search and seizure? (Not argued in this brief)

11. Were petitioners denied a fair trial by the trial Court's handling of a request from the jury to have read

to them the testimony as to what the Narcotics Agents overheard in alleged conversations between petitioners Dioguardi, LeFranc and Sutera at the Adano Restaurant in New York City, the trial Court having allowed to be read to the jury primarily the direct testimony of the Agents themselves and not the relevant entirety of their cross-examination testimony, which latter we contend had destructively impeached their direct testimony of having been able to overhear what they said they overheard as a matter of the sheer physical possibilities of the scene?

12. Were petitioners denied a fair trial by an impartial jury in view of the fact that after commencement of the trial in New York City an article appeared in a newspaper of that City referring to petitioner Dioguardi as "Frank Diaguardi [sic] 42, identified by the Government as an underworld figure here", and the trial Judge having refused to hold a hearing on whether the Government had in fact "leaked" the information? (Not argued in this brief)

13. Was the evidence sufficient for submission to the Jury or for conviction?

Constitutional Provisions and Statutes Involved

The case involves the Fourth (search and seizure), Fifth (due process and self incrimination), Sixth (impartial jury, confrontation, presence at trial, assistance of counsel) and Ninth (reserved right of privacy) Amendments of the United States Constitution. It also involves 21 U.S.C. §§ 173, 174 (narcotics violation), and F.R. Cr. P. Rule 28(b) (Court appointed interpreters); these statutory provisions are quoted in Appendix A hereto, *infra*.

STATEMENT OF THE CASE

Petitioners were tried together on a charge of narcotics importation conspiracy (21 U.S.C. §§ 173, 174), and they were all convicted (S.D.N.Y., Palmieri, D.J. and a jury). They were sentenced as follows: Desist, 18 years; Dioguardi, 15 years; LeFranc, 20 years and a committed fine of $5,000; Nebbia, 20 years and a committed fine of $5,000; Sutera, 10 years. The United States Court of Appeals for the Second Circuit has affirmed all of the convictions. This certiorari proceeding seeks review of the latter judgment of the Court of Appeals.

The Indictment

The indictment (24a*) was filed January 5, 1966 (1a). It charges that from on or about August 1, 1965, to the date of the indictment, in the Southern District of New York and elsewhere, the defendants Dioguardi, Sutera, Desist, LeFranc and Nebbia, together also with another defendant Herman Conder, and others to the Grand Jury unknown, conspired to violate 21 U.S.C. §§ 173 and 174, (1) by importing narcotics from France and other countries to the Grand Jury unknown, (2) by receiving, concealing and facilitating the transportation and concealment of narcotics and knowingly importing them unlawfully into the United States, and (3) by attempting to conceal the existence of the conspiracy. Six overt acts were alleged, no. 3 of which related to Dioguardi and Sutera, as follows (25a):

> "3. Further in pursuance of said conspiracy and to effect the objects thereof, on or about December 17,

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* " a" refers to the printed "Joint Appendix For Appellants" in the Court below.

1965, the defendants Jean Claude LeFranc, Frank Dioguardi and Anthony Sutera were present in the vicinity of 115 West 48th Street, New York, New York, in the Southern District of New York."

The bill of particulars as to Dioguardi and Sutera specified, with respect to the above quoted overt act No. 3, "Adano's Restaurant, between approximately 8:45 P.M. and approximately 11:00 P.M." (R. 2920).

The overt act allegations concerning Nebbia were: Nebbia was named in overt act No. 1 as having traveled from Paris, France to the United States on or about December 14, 1965 and registered at the Waldorf-Astoria Hotel in New York; overt act no. 2 alleged that on or about December 16, 1965 Nebbia and Desist had a conversation at a stated place in New York City (specified in the bill of particulars as the Waldorf-Astoria at approximately 8 P.M.); overt act no. 6 alleged that on or about December 20, 1965 Nebbia and LeFranc traveled from Columbus, Georgia to New York City (25a-26a).

The overt act allegations naming LeFranc include those referred to above in connection with Dioguardi, Sutera and Nebbia. They relate to LeFranc's alleged conversations with Dioguardi and Sutera on the evening of December 17, 1965 at the Adano Restaurant on West 48th Street in New York City; and to his alleged airplane trip with Nebbia from Columbus, Georgia back to New York City on December 20, 1965 (25a-26a). The bill of particulars as to LeFranc stated that "The Government will claim the defendant LeFranc had constructive possession of the narcotics" (R. 2922-2923).

The overt act allegations as to Desist include the one referred to above as to a conversation with Nebbia on December 16, 1965, and a conversation on December 19, 1965 with Herman Conder in Columbus, Georgia; and that on the latter date Desist traveled from Columbus, Georgia to the Southern District of New York (25a-26a).

The Government's Theory of the Case*

The Government's theory of the case was that petitioner Desist, a United States Army Major stationed in France, and Herman Conder, a United States Army Warrant Officer in France,** in October 1965 shipped to the United States a deep freeze unit in which was concealed a large quantity of pure heroin; that Desist came to the United States in December, 1965 to contact Conder who had meanwhile moved back to this country, and to get possession of the heroin in collaboration with petitioners Nebbia and LeFranc; that Nebbia and LeFranc also came to the United States around that same time; that in Nebbia's hotel room at the Waldorf-Astoria Hotel in New York City he held conversations (separately) with Desist and LeFranc which revealed alleged important details of the alleged conspiracy as overheard and recorded on an electronic apparatus which the Government claimed involved no "trespass" because the apparatus was claimedly located entirely within the bounds of a hotel room engaged by Narcotics Agents, immediately adjoining Nebbia's hotel room;

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* Record references for factual recitals in the following summary are given in other connections *infra*.

** Conder was indicted in this case, but was severed for trial and he testified for the Government.

that after the "bugged" Waldorf-Astoria conversation between Nebbia and LeFranc, the latter was followed by Narcotics Agents who saw him meet with petitioners Dioguardi and Sutera, and thereafter the Agents overheard LeFranc, Dioguardi and Sutera conversing at a small bar in a New York City restaurant (Adano's), the conversation allegedly being relevant to the within conspiracy charges and indicating (according to the Government) that Dioguardi and Sutera were negotiating with LeFranc for purchase of the heroin which was somewhere in Georgia or the Georgia region; that thereafter Nebbia and LeFranc flew to Columbus, Georgia where they met Desist; that Desist was staying at the Black Angus motel in Columbus, Georgia; that Nebbia and LeFranc rented a car in Columbus and later another car in Atlanta in which they made various peregrinations denoting furtive purpose and activity; that Nebbia and LeFranc visited Desist's room at the Black Angus motel; that Desist met with Conder at the Black Angus motel restaurant; that the Agents tracked down Conder and placed his home under surveillance; that Nebbia and LeFranc, evidently suspicious that they were being watched, returned to New York, and Desist did likewise, without taking possession of the heroin; that Nebbia and LeFranc had been followed by Government vehicles as they traveled around the Atlanta-Columbus region; and that on the day after Nebbia, LeFranc and Desist left the Georgia region the Agents, under a search warrant, seized the heroin from Conder, and then placed him under arrest.

The Government's proofs at the trial consisted of testimony by Conder; testimony by Narcotics Agents as to the New York City eavesdropping, the Adano restaurant conversation, and the movements of the various defend-

ants in New York and Georgia; testimony by airline employees, car rental company employees and the like; and the introduction into evidence of the seized heroin.

There was no proof by the Government at the trial, and no other indication until the appeal (*infra*), that the Government had also trespassorily "bugged" one of the rental automobiles used by Nebbia and LeFranc in Georgia, as well as conversations of Dioguardi in Miami, Florida, in 1962-1963.

The Trial Proofs Particularly Relating to Nebbia

It is undisputed that Nebbia arrived in New York from Paris, France and checked into Room 1602 of the Waldorf-Astoria Hotel around December 11, 1965. The electronic bugging of Nebbia's hotel room is described, from the technical standpoint, in another connection *infra*. That bugging is said to have revealed two important conversations, one by Nebbia with Desist about 8 P.M. on December 16, and another by Nebbia with LeFranc about 4:30 P.M. on December 17. Agent Kiere, who was monitoring the listening device in the adjoining room 1600 at the Waldorf-Astoria testified as to what he personally heard coming through on the amplifier simultaneously with the making of tape recordings (R.553-563). Kiere said that in the Nebbia-Desist conversation he heard the following (R.558-561):

> "A. The two defendants were conversing. The defendant Desist said that he was going to fly to Rochester, New York, that he was going to see the boss, and that from Rochester, New York he was going to fly to Atlanta, Georgia, and from Atlanta, Georgia, to Columbus.

He said that he would call someone, not mentioned by name, to come to get him at the Columbus Airport.

He stated to Nebbia that there was a problem that he had to do with someone not named, that he would come and put twenty bills in his hand, and if he showed up now with nothing in his pocket there might be a little problem in getting the merchandise.

Q. Incidentally, Agent Kiere, what connotation does that word 'merchandise' have to you as a narcotics agent?

Mr. Younger: Objection.

Mr. Stream: Objection.

The Court: Overruled. You may testify.

A. As a narcotics agent merchandise means a certain amount of heroin or narcotics.

Q. Very well. Go ahead. A. Mr. Desist also inquired of Mr. Nebbia concerning suitcases. Mentioned the name Black Angus and referred on several occasions to a motel in Columbus.

He said it would take three or four hours to make the transfer and at one portion of the conversation he said—

Q. Who said— A. Mr. Desist said, 'You are fortunate'—'I am fortunate, I am about two days, whereas it will take you approximately a week to return to Europe.

On two or three occasions the word 'trailer' or 'shed' was mentioned.

Mr. Nebbia explained to Mr. Desist that he was going to take an airplane from Atlanta and meet him in Columbus. There was a conversation, Mr. Desist asked Mr. Nebbia, 'Do you have a driver's license?'

Mr. Nebbia replied, 'Yes, I do.'

Mr. Desist said, 'I have an American license but it is expired. When I went to rent a car they would not accept it and I had to show my French license.'

Mr. Nebbia said, 'Well, it doesn't matter because you are an American,' to which Mr. Desist replied, 'No, it is worse.'

Mr. Nebbia also said there are risks involved. There was some more small talk, but this is in essence what that conversation consisted of.

Q. Calling your attention to December 17th—

The Court: Before you get to that, may I interject with a question?

This conversation between Nebbia and Desist was that in French?

The Witness: Yes, sir, it was, your Honor.

The Court: All of it was in French?

The Witness: Yes, it was, your Honor.

The Court: Did either Nebbia or Desist have a perceptible accent?

The Witness: Yes. Mr. Desist spoke French well. However, he had a marked American accent. Also I would like to point out throughout the conversation both men referred to each other in the familiar form of French by the use of 'tu' instead of the more respectful 'vous'."

Kiere testified that in the Nebbia-LeFranc conversation he overheard the following on the electronic bug (R. 561-563):

"Q. With respect to the conversation of December 17th will you tell us, Agent Kiere, the substance of that conversation which you overheard? Preliminarily, let me ask you, was this conversation in English or French? A. This conversation was again in French.

Q. Tell us if you will please the substance of the conversation.

Mr. M. Edelbaum: Same objection.

The Court: Same ruling.

A. The conversation again was in the familiar form with the word 'tu' rather than 'vous' indicating people who have known each other for a while or are familiar with each other.

Mr. LeFranc and Mr. Nebbia were conversing at this time at approximately 4:30 in the afternoon of the 17th. Mr. LeFranc stated that he would go get a ticket for Atlanta and from there to Columbus for Nebbia.

Mr. LeFranc inquired of Mr. Nebbia whether he had suitcases and said, 'Will you buy some suitcases down there.' In a fairly long sentence he repeated, 'You will get the car, we will arrange to buy the suitcases and then from there we will go to the motel. You will leave me at the motel, you will take care of things.

And again in this conversation the word 'trailer' or 'shed' occurred.

The Court: When you say 'trailer' or 'shed', you mean there is a French word which you have translated in both ways or in one of those two ways?

The Witness: The French word 'baraque' or—

The Court: How do you spell that?

The Witness: B-a-r-a-q-u-e.

The Court: Which you say connotes either a trailer or a shed?

The Witness: Yes. In my estimation it can be translated either way, or 'cabane' which also is a French word which most likely referred to shed rather than trailer.

Mr. LeFranc stated in the course of the translation there are people who come over here with things, they have lost these things and they have

disappeared. So you know this has happened before. To which Mr. Nebbia replied, 'Unfortunately there are people like that.'

In essence this is the conversation which I overheard.

Mr. Tendy: Your Honor, at this time I should like to offer in evidence Government's Exhibits 85, 85-A, 85-B and Government's Exhibit 86 for identification.

Mr. Edelbaum: We would object on all the grounds heretofore stated, your Honor.

The Court: I make the same ruling with respect to the evidence, not being presently connected to the three defendants already mentioned, so that Mr. Jones and Mr. Edelbaum's objections meet with the same ruling.

Mr. Stream: The objections are the basic ones made in chambers.

Mr. Edelbaum: I object on the ground heretofore stated during all of our discussions, your Honor.

The Court: Very well. I overrule those objections. The tapes may be marked in evidence."

We note that Kiere's claim of having heard the word "trailer" in the Nebbia-Desist conversation is highly questionable, because no such word or reference appears anywhere in the transcript translations of the tapes prepared by Kiere with much painstaking labor before the trial. See Government exhibits 19, 20 and 21, all for identification (see Point III, *infra*). This alleged "trailer" reference is of utmost importance because of the imputation of a connection with Herman Conder in Columbus, Georgia, where the narcotics were seized on December 20.

The question of how agent Kiere knew that the voices he heard were those of Desist, Nebbia and LeFranc is of prime importance in this case (Point III, *infra*).

Carol Rippe, a ticket agent for Eastern Airlines at the airlines building, 80 E. 42nd Street, testified that on December 16, 1965 she wrote a ticket for Mr. J. Nebbia to fly from New York to Atlanta and Columbus, Georgia on December 18; Nebbia was there with LeFranc, both of whom she identified in Court; LeFranc did the buying of the ticket for Nebbia and conducted the conversation with Miss Rippe; LeFranc originally asked for a ticket to Atlanta, and when Miss Rippe asked where they were going after that (with a view to helping them with further reservations), LeFranc said that they wanted to go to Columbus, Georgia, so Miss Rippe told them that Eastern Airlines could fly them to Columbus directly; when Miss Rippe asked LeFranc if he wanted to book a return trip he said no, because he would be renting a car in Columbus and driving around there, and would then be going on to Miami; when Miss Rippe then asked LeFranc if she could help them with a reservation to Miami on Eastern Airlines, LeFranc said that their plans after driving around Columbus were not definite as to how they would travel to Miami (R. 985-991). Miss Rippe also testified that on the next day, Friday afternoon December 17, 1965, she saw LeFranc again at the ticket counter (R. 991). Through Miss Rippe the Government introduced in evidence its exhibit 59, Nebbia's airline ticket (R. 992).

Nebbia and LeFranc traveled to Columbus, Georgia on the morning of December 18, agent Kiere being on the same plane (R. 627-630). We have alluded to the massive sur-

veillance in Georgia in which Nebbia and LeFranc were seen with Desist and were said to have engaged in certain furtive movements around or near the area where Conder was, Nebbia and LeFranc returning to New York on the night of December 20 without being claimed by the Government to have achieved any contact with Conder or with the latter's cache of narcotics. For the surveillance testimony in Georgia, and related testimony see R. 1368-1389, Baker; R. 1442-1452, Thompson; R. 1452-1496, Waters; R. 1544-1559, Pair; R. 1550-1557, Ratteree; R. 1566-1570, Priest; R. 1572-1582, Johnson.

Exceptionally impressive character testimony was introduced on Nebbia's behalf, and we respectfully urge the Court to examine it (R. 1914-1937).

The Trial Proofs Particularly Relating to Dioguardi and Sutera; the Limited Sector of the Case Involving Those Two Petitioners

As seen, the Waldorf-Astoria bugging of Nebbia's room between December 14 and 18 or 19, 1965, is said to have disclosed two important conversations for the purposes of the Government's case, one being the conversation of December 17, about 4:30 P.M. between Nebbia and LeFranc. The Government claims that after this latter conversation between Nebbia and LaFranc was bugged in the afternoon of December 17, Agents followed LeFranc, and that the latter met that evening with the defendants Dioguardi and Sutera after which those three went to a restaurant on West 48th Street in New York City called Adano's. Three Agents are said to have followed them into the restaurant and to have overheard a conversation at the bar in which there were references to some kind of transaction or contem-

plated transaction involving Atlanta and "merchandise"; the conversation also allegedly included remarks denoting that risk was involved in making "these transfers"; and the parties allegedly spoke of eventually meeting in Miami and of making a "transfer" by LeFranc to Dioguardi and Sutera, etc.

The sole inculpative testimony as to Dioguardi and Sutera is that which deals with the above mentioned alleged conversation with LeFranc at the Adano Restaurant on the evening of December 17, 1965. This testimony needs to be noted in detail.

Three Agents are said to have been present at this conversation (Agents Smith, Gruden and Thomas). The Government called Agents Smith and Gruden to testify as to this branch of the case. Gruden described the alleged conversations as follows (R. 1057-1064):

> "• • • After entering the restaurant they stood at the coat check room there and as they were checking their coats, I was able to overhear them talking. LeFranc was talking about the filth of New York City and the fact that he had dirt in his eye and he had to go to the hospital to have it removed.
>
> He further went on to say that he was looking forward to the trip down south in the morning, and that he heard Atlanta was a much cleaner place than New York City.
>
> Dioguardi agreed with LeFranc that New York City was a dirty place and that he would indeed like Atlanta much more and would find it a much cleaner place than New York City, and that he would enjoy the night life of Miami more than New York City.

Q. What language was this conversation in? A. English, sir.

Q. Where was the coat check room in relationship to the entrance to the restaurant? A. Well, as you walk in the door, the coat check room, as you walk in the door, would be directly in front of you, approximately maybe six to eight feet in front of you.

Q. Was there any further conversation that you were able to overhear while you were waiting? A. Yes, sir. I overheard Sutera state that he also thought New York was a dirty place and he would be looking forward to going to Miami. He further stated that the thing that annoyed him most about New York was the crowded conditions and the heavy traffic.

Q. Did Dioguardi, Sutera and LeFranc check their coats then? A. Yes, they did.

Q. What did you do? A. I also checked my coat and then went to the bar.

Q. And where did the defendants Dioguardi, Sutera and LeFranc go? A. They went to the bar also.

Q. Would you describe to the jury what that bar was like, what it looked like, and what its relationship was in that restaurant? A. Well, the bar would be, as you are facing the coat check room, the bar would be directly to the left, say, a small, more of a service bar, approximately, I would say, approximately twelve feet long. It's very small.

Q. Was it as long as this jury rail? A. I would say it was shorter than the jury rail.

Q. Was there a bartender there working? A. Yes, sir, there was.

Q. Did you go over to the bar as well? A. I did.

Q. What did you do? A. I ordered a drink.

Q. And did the defendants order a drink? A. They did.

Q. Tell us what happened then? A. Shortly after I got to the bar I was joined by Agents Thomas and Smith. After being joined by them, we all ordered a drink. Then I observed Dioguardi leave the bar and walk in the direction of the telephone which is located on the side of the coat check room. He was followed by Agent Smith at this time. Shortly later he came back to the bar and joined Sutera and LeFranc.

At this time I overheard him say, 'O.K., everything is all right on my end.'

Q. Who did you overhear say that? A. Dioguardi stated, 'O.K., everything is all right on my end, but we still have to iron out a few problems.'

Sutera then remarked that 'We haven't seen anything yet.'

And then LeFranc stated, 'I have explained this to my friend who has assured me that it is here already. All we have to do is go down there, pick it up, and then make the transfer to you at a place of mutual agreement.'

Q. And who said that? A. Mr. LeFranc.

Q. How far were you from these three people when you overheard this conversation? A. I would say three feet.

Q. How many bar stools were at that bar, if you recall? A. I don't recall. There were very few.

Q. Did you hear any further conversation? A. Yes, sir, I did.

Q. Would you tell the jury what you heard? A. Dioguardi stated to LeFranc, 'Your friend doesn't trust anyone. We, too, like to be careful about these things, but we would like to know a little bit more about the way the deal is to come off.'

Then Sutera remarked that—he suggested that they would go with LeFranc in the morning to Atlanta, to pick up the merchandise, and thus save LeFranc the trouble of making an extra trip.

LeFranc replied that this was impossible, that he and his friend would go to Atlanta, pick up the merchandise and then call them later in Miami for the transfer.

Sutera remarked that this seemed like a waste of time, and then during this time LeFranc stated that 'These transfers are risky business, there is much to lose here and one cannot be too careful, so we must insist that we do it our way. In the past people have been betrayed, and everything has been lost, even the people.'

Q. Are you giving us the exact words of the conversation, as best you recall? A. No, sir, I am giving you, as I remember, the substance of the conversation.

Q. And are any of the words that you are testifying to the exact words? A. Yes, sir.

Q. Do you recall which ones? A. I specifically remember them on several occasions saying 'transfer,' 'the merchandise.' I specifically remember them saying 'the trip to the south in the morning, to Atlanta.'

Q. How long have you been an agent of the Federal Bureau of Narcotics? A. Approximately two and a half years.

Q. Does the word 'merchandise' have any meaning to you? A. Yes.

Mr. M. Edelbaum: Objection.

The Court: Overruled.

Q. What does the word 'merchandise' mean to you—

Mr. M. Edelbaum: Objection.

Q. —as an agent of the Federal Bureau of Narcotics?

The Court: Overruled.

A. The word 'merchandise' denotes to me narcotics, particularly heroin.

Q. Do you remember any further conversation at that bar? A. Yes. Mr. LeFranc further went on to say that 'In the past people have been betrayed, and everything has been lost, even the people; we must insist that we do this our way.'

He further went on to say that 'I myself have never met the contact man, but once I receive the merchandise, I will make the transfer personally to you.'

Q. Who said that? A. Mr. LeFranc.

Q. And who did he say it to? A. He was speaking to Dioguardi and Sutera.

Q. Was there anything else that you heard? A. Yes, sir. They then asked him—Mr. Sutera then asked him, 'When will we meet you?' And he stated he couldn't be sure until the transfer was made to him.

Q. Who is 'he'? A. Mr. LeFranc stated that he couldn't be sure until the transfer was made to him, and that he didn't want to hold on to the merchandise for too long, that it would probably be the night after, maybe Monday or Tuesday.

He further went on to say that he would have a car, and the transfer would be made from the car supplied by him to a car supplied by them, and that he expected this to be Monday or Tuesday. He also suggested that he felt the nighttime would be safer.

Q. Who is this who is talking? Who suggested that the nighttime would be safer? A. This is Mr. LeFranc talking.

Q. Do you recall whether either Dioguardi or Sutera made any response to that? A. As I recall, there was a remark made at the bar, 'Perhaps when this is over you can enjoy the night life of Miami,' and Mr. LeFranc did respond, he would be much relieved, he would be much relieved when this was over."

Agent Smith described the alleged Adano restaurant conversations as follows (R.1139-1144):

"A. As I entered the restaurant, after checking my coat I joined Agent Gruden at the bar. He was standing at the south end of the bar, closer to the south end. I observed Douheret,* Dioguardi and Sutera standing at the north end of the bar.

Right after entering Dioguardi left Sutera and Douheret and he walked to a telephone booth which is on the back end of the hat check.

Q. What did you do? A. I left the bar, walked over and stood near the telephone, jiggling some coins in my hand. I overheard Dioguardi on the phone talking to someone. He stated he was with the man now, and they were leaving for Atlanta in the morning. He paused, and then he said that he wasn't sure, but he expected to see him again either Monday or Tuesday, and that they would call him in Miami confirming the time.

He then completed the call and walked back to the bar. I then went to the telephone and placed a call to the office of the Bureau of Narcotics.

Q. What did you do after placing the call? A. I returned to the south end of the bar and rejoined Agents Gruden and Thomas.

Q. What happened then? A. I observed the three, Sutera, Diaguardi and LeFranc at the bar. I overheard parts of their conversation. I overheard Sutera say to Douheret that they had not seen anything yet, and Douheret answered, he said, he had explained that to his friend who assured him that it was here already. All they had to do is go down there and pick it up and make the transfer somewhere down there, wherever they could agree upon.

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* "Douheret" is Le Franc.

Sutera—Dioguardi then said to Douheret that 'Your friend don't trust anyone,' and Sutera then asked, then suggested to Douheret that they go with him down to Atlanta tomorrow, pick up the merchandise and save him an extra trip.

Q. Let me interrupt you at this point and ask you this question. What does the word 'merchandise' connote to you as a narcotics agent?

Mr. M. Edelbaum: Objection.
Mr. Jones: Objection.
The Court: Overruled.

A. The word 'merchandise' denotes to me narcotics.

Q. Go ahead. A. At the suggestion of Sutera that he accompany Douheret down to Atlanta, Douheret said no, it was impossible, he would have to do—they would have to do it the way that he and his friend wanted them to do it.

Sutera then said, 'It seems like a waste of time,' and Dioguardi told Douheret that 'We should—you should—your friend should trust us more.'

Douheret then said that 'These transfers are risky business. In the past people have been betrayed and everything was lost, even the people. There is much to lose in this transaction, so we must insist that we do it our way. When I know the time I will call you in Miami.'

Dioguardi and Sutera started to interrupt him, but he continued and told them that—he told them that others before them have made these transfers a risky business. So he said that 'he is my friend. I know that you are all right, but he, he insists that it be done his way.'

He said, 'I myself have never met his contact man, but when I receive the merchandise I will make the transfer to you myself.'

Sutera then asked him, 'Well, all right. When will we see you?'

And Dioguardi wanted to know how the deal would go down. He said he could not—

Q. Who said? A. Dioguardi asked Douheret how the deal would go down, and Douheret said, 'I cannot be sure until the transfer is made to me,' but he said that he didn't want to keep the merchandise long, so it would be the night after he received it, either Monday or Tuesday. He told them that he would have a car and a transfer would be made to a car supplied by Dioguardi and Sutera. He suggested that night would be safer. He told them he couldn't be sure until he received the merchandise, and then he would call them. He expected it would be on Monday or Tuesday.

Q. What else happened? A. Sutera then told him that after the transfer was made he would be able to enjoy Miami. Douheret said he would be much relieved.

Right after this, shortly after this, the waiter came and told Dioguardi that his table is ready.

They then walked to a table just north of the bar. Dioguardi sat facing west, to the right of Douheret who sat with his back to the bar, and Sutera was facing east, he was to the left of Douheret.

Shortly after they went to the table I had a conversation with Agent Thomas and a conversation with Agent Gruden.

Q. Where was Agent Thomas? A. He was at the bar.

Q. With you? A. Yes.

Q. Go ahead. A. Right after the conversation Agent Thomas and Gruden left the bar, and I then moved to—I was then the only occupant of the service bar, I moved down to the north end of the service

bar, closer to the table occupied by Dioguardi and Sutera and Douheret.

About 10 o'clock I heard Dioguardi say he was going to place—make a telephone call. As he got up I walked to the phone booth, and I placed a telephone call. When Dioguardi came to the telephone I was on the telephone. He then returned to the table. A few minutes later he came up to the telephone and placed a telephone call.

Q. By 'he' who do you mean? A. Dioguardi.

Q. And where were you when he came to the telephone? A. As he started for the telephone I was at the bar, I went to the telephone, I waited about 30 seconds to a minute, then I walked over and stood near the telephone. I overheard him telling someone that he would be leaving soon; this was a once-a-year deal and it takes time to iron out the problems; it would not be long because the person who was leaving had to get up early in the morning, and that he would make it up to the person he was talking to.

He then returned to the table with Douheret and Sutera."

The Dioguardi and Sutera defense at the trial probed insistently into several aspects which were believed to afford strongly circumstantial indications that the above testimony of the agents was unreliable to the point of incredibility as a matter of law. Because the bar in the Adano Restaurant was so small as to make it intrinsically beyond belief that alleged conspiratorial malefactors such as the within defendants would have conducted the above kind of conversation in the necessarily close proximity (indeed contiguity) to three strangers in such close quarters—the entire linear space available at the bar for patrons was not more than ten feet, nine inches minus a space of perhaps three feet

for service implements (R. 1901-1908, 1912)—the defense devoted its most earnest efforts to exploring the factual issue of whether the agents were in fact present at the Adano bar as claimed. To begin with, the Dioguardi-Sutera defense adduced what we think we may say were strong proofs on the "physical facts".* The agents themselves had testified that at this linear bar space of less than eleven feet (minus three feet for service implements and two to four feet unused at the ends of the bar (*infra*)), there had been a gap of two to six feet between their group and the defendants' group (R. 1121-1122, 1877, 1301, 1060, 1085); and that, as above intimated, there was an unused space of one to two feet at each end of the bar (R. 1121-1122). Furthermore two employees of the Adano Restaurant testified without contradiction—and, be it noted, without cross examination by the Government—that never in their many years of experience at that place had there been as many as six persons at the bar at one time (R. 1910, 1913). All of the agents also swore that they heard no music or TV while they were in Adano's (R. 1093, 1011, 1231-1232, 1883). The above mentioned two employees of Adano's swore that there was continual music (R. 1909, 1912).

Then there were several quite disturbing (we must say) contradictions among the agents' own testimony which bring to mind Gibbon's phrase, "A melancholy doubt obtrudes itself upon the reluctant mind"—a doubt, in this instance, *as to whether the agents were there at all, especially agent Smith.* Thus, agent Hughs, who was in a station of outside

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* See the testimony last cited, and the photographs of the Adano bar and restaurant interior, Dioguardi and Sutera Ex's S, P, N, X, W, V, L, U (R. 1886); see also the survey exhibit (Dioguardi and Sutera Ex. Z (R. 1905)).

surveillance across from the Adano Restaurant on the occasion in question, testified that while he saw agents Gruden and Thomas enter the place rather shortly after the defendants did (two to ten minutes) he had no idea as to when agent Smith entered the restaurant, *and it could have been as late as 11 P.M.—the others had all entered around 8:30 or 8:45 P.M. and the alleged conversation had occurred shortly thereafter* (R. 1035-1039). Perhaps even more interesting was agent Hughs' testimony that he did not even know when agent Smith left the Adano Restaurant (R. 1040)—it would in truth be logical and believable that agent Smith would not have been seen leaving Adano's, *if he had never been there.*

Other important discrepancies among the agents as to whether or when they were at Adano's may be discerned by referring, in the following juxtaposition, to the following pages of the trial testimony: R. 1188-1191, 1239-1246, 1296-1300, 1056-1057, 1059, 1080, 1864.

At R. 1817-1819 defense counsel for Dioguardi and Sutera unavailingly requested the Trial Court to permit the Jury to view for itself the physical scene at the Adano Restaurant in the light of the above remarkable testimony of the agents themselves and of the proofs pointing to the sheer physical incredibility of the agents' basic inculpative testimony against these two defendants. See also the summation by Dioguardi's and Sutera's counsel, where the discrepancies herein referred to are systematically collected and the relevant testimony quoted *in extenso* (R. 2089, 2093, 2118-2134, 2138-2141, 2143, 2156-2159).

Dioguardi and Sutera introduced affirmative evidence in their defense as follows:- Dioguardi brought witnesses to testify that on the day in question (December 17-18, 1965)

he was transacting substantial business affairs in New York City in connection with obtaining entertainment acts for his restaurant and cabaret in Miami (R. 1824-1832, 1834-1845). In responding to the Government's proofs that Dioguardi and Sutera had registered at a motel in New York under names which were not their own, Dioguardi called the witness Diana Perri, who testified that Dioguardi had used her name with her consent in registering at the motel (R. 1845-1855). The prosecution did not cross examine Miss Perri; and indeed the defense called agent Hughs back to the stand as its own witness to establish that Dioguardi and Miss Perri had committed no sinister or immoral acts at the times in question (R. 1856-1862).* It was pointed out by defense counsel that Dioguardi and Sutera used their true names in obtaining their airplane tickets for this trip to New York and their automobile rental in New York (R. 2160).

What, then, is the place of Dioguardi and Sutera in this prosecutive scene? It is, simply and solely, that they are alleged to have been in the company of LeFranc and to have had a conversation with him which referred to some transaction of a "risky" nature involving "merchandise" which was to be "transferred" under some kind of security measures somewhere between Atlanta and Miami. Taking the Government's case in its best and strongest aspect, then, as to Dioguardi and Sutera, the proofs involving these two petitioners placed them in no connection whatever with any activity of any other defendant except a possible connection as prospective purchasers or agents for purchasers.

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* Sutera called no additional witnesses; he is Dioguardi's brother-in-law and employee, and was accompanying Dioguardi on the trip to New York from Miami.

The Trial Proofs Particularly Relating to LeFranc

As seen, Nebbia having been placed under surveillance, including electronic surveillance, after he had arrived in this country and had taken a room at the Waldorf-Astoria in December 1965, the first significant appearance of LeFranc on the scene (according to the Government's proofs) was in the alleged conversation (above quoted) with Nebbia, which was bugged, around 4:30 P.M. on December 17, 1965 in Nebbia's hotel room.

Evidently as a direct surveillance derivative from the above electronic eavesdropping on the afternoon of December 17, LeFranc was followed by agents over the next several hours, and was observed joining the defendants Dioguardi and Sutera; then came the agents' alleged overhearing of the alleged conversation between Dioguardi, Sutera and LeFranc at the *Adano Restaurant later that evening*, as described *supra*. This is the alleged conversation in which LeFranc, Dioguardi and Sutera are supposed to have discussed—in a manner of practically imbecilic unguardedness and foolhardiness, considering the blatantly "non-security" character of the situation as testified to by the Government's agents, who described what would have had to be a virtual cheek-by-jowl proximity between six men (three agents and three defendants) at a very small public drinking bar in a small restaurant—some kind of "deal" and "transfer" of "merchandise", with references to Atlanta and Miami and the riskiness of the transaction. See, in our description *supra* of the proofs particularly relating to Dioguardi and Sutera, the references to the trial proofs which are believed to point to the inherent incredibility, as a matter of law, of the agents' testimony concerning the alleged Adano conversation.

The following morning (December 19, 1965) LeFranc and Nebbia were observed traveling by plane to Columbus, Georgia, and during that day and the next day there occurred that previously mentioned massive surveillance of LeFranc, Nebbia and Desist in the Atlanta-Columbus, Georgia, region, in which LeFranc and Nebbia were described as engaging in furtive movements. It will be recalled that neither LeFranc nor Nebbia is accused of having made any contact with Herman Conder or with the narcotics in the latter's possession in Columbus, Georgia. There is strongly disputed testimony that LeFranc and Nebbia, in returning from Georgia to New York City, used false names; the "identification" testimony pertaining to this alleged incident was noted by the Trial Court itself as being doubtful (76a).

A prime factual issue at the trial concerning LeFranc was that he had, concededly, come to the United States using a false passport. The LeFranc defense introduced what we think we may say was very strongly impressive proof that his false travel documents were entirely explainable without reference to any narcotic purpose or involvement, because LeFranc was a member of a secret French political organization known as the "O.A.S.," a patriotic organization of the Algerian French dedicated to the restoration of French rule in Algeria, in opposition to the policies of President DeGaulle. See the deposition testimony (received in evidence at this trial) of the witnesses Feischoz (R. 1671-1699, 1717-1730) and Calle (R. 1731-1811, 1820-1824). Messieurs Feischoz and Calle are high functionaries of the O.A.S. residing in political exile under the asylum hospitality of the Spanish Government, their depositions having been taken in that country. Not only for the sheerly gripping, dramatic

and indeed literarily fascinating quality of this deeply moving deposition testimony by men of unmistakably heroic stamp and iron integrity of character—qualities which must be acknowledged by any reader of this deposition testimony regardless of his own political predisposition concerning the "Algerian question"—but, doubtless more to the point, for the quite convincing picture which the deposition testimony gives as to LeFranc's own honorable services to a cause which he and his compatriot colleagues evidently regard as high and sacred, this Court might well wish to read with special closeness the testimony of Messieurs Feischoz and Calle. For, if that testimony is believed, it becomes entirely believable that LeFranc was in this country for purposes of a character, in terms of human values, diametrically opposed to any purposes of persons engaged in the international narcotics traffic. Needless to say we realize that it was for the Jury to believe or not to believe that LeFranc's presence and conduct in this country with reference to the matters charged in the indictment and at the trial were for a purpose innocent of narcotics involvement. We nevertheless want this Court to know that the case of LeFranc is not being tendered for review here on a basis of conceded or assumed guilt, or on a basis of any silent or express acknowledgement of the sufficiency of the evidence. We have in mind also, in thus calling attention to the altogether believable alternative explanation of LeFranc's apparently surreptitious activities in this country, that the points of constitutional injustice and unfair trial which LeFranc is raising in this case are being presented to this Court by a man who is pleading practically for his life, not in a merely technical or legalistic frame of mind, but out of a deep sense of the justness of his cause.

The Trial Proofs Particularly Relating to Desist

Desist's alleged conversations and other contacts with Nebbia and LeFranc in New York and Georgia have been described. It remains to note the testimony of the Army Warrant Officer Herman Conder concerning the alleged heroin activities in France between Conder and Desist, which preceded the happenings in this country in December 1965; it will be recalled that Conder, a co-defendant, was severed from this trial and testified for the Government.

Herman Conder (R. 30-78) testified that he knew Desist from France, where both were stationed with the United States Army in 1965. Desist was a Major, Conder a Warrant Officer. Desist was Conder's landlord in France. As Conder's European tour of duty was nearing its end in the summer of 1965, Desist broached to him that he (Conder) should obtain a deep freeze and have it shipped to the United States with his personal belongings, for which Conder would receive $10,000. A second-hand deep freeze was obtained, Conder tidied it up and dismantled it in part, and in September, 1965, one morning, Conder found the deep freeze completely reassembled; he had no knowledge as to who had done this. The deep freeze was shipped back to this country with Conder's household goods. Before Conder left France in the Fall of 1965 Desist gave him $300 and spoke of visiting him in the United States. Around December 12, 1965 Desist telephoned Conder at the latter's residence in Columbus, Georgia and said he would visit in a few days. On December 18, 1965 Desist and Conder met in Columbus, Desist gave Conder an additional $2,000, and spoke of obtaining suitcases for the contents of the deep freeze, which were to be picked up by two persons referred to by Desist

as "they", whom Desist said Conder would recognize as Frenchmen. Over the course of the next two days (December 18-19) Desist met with Conder a few times, spoke of difficulties which had arisen because "they" thought they were being followed, and finally instructed Conder to purchase some suitcases in which to pack the contents of the deep freeze. Conder bought four suitcases, and on Sunday, December 19, he unpacked the deep freeze, which contained plastic bags of a white substance. Conder kept the suitcases, plus a fifth one that he had had to use to contain all the plastic bags, in his trailer and shed in Columbus, Georgia. Later that day Desist told Conder that "they" would not be picking up the suitcases for a few more days owing, apparently, to "their" fear that they were being followed.

As seen, there had been surveillance of Desist, Nebbia and LeFranc on December 18 and 19, 1965 in the Atlanta-Columbus region, which included surveillance of Desist in the alleged contacts with Conder. The climactic development was that around noontime on December 20, 1965 the agents arrested Conder and seized from his home trailer in Columbus, Georgia, and from an adjacent shed, a large quantity of heroin (209 lbs. contained in 190 plastic bags).

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The facts more specifically relating to the electronic eavesdrop issues, and to other point raised in our Questions Presented, as well as pertinent rulings of the Courts below, are treated in connection with the respective points of Argument, *infra*.

Summary of Argument

1. The Government has conceded in this Court (Br. In Opp., p. 9) that "If the principle announced in *Katz* [*Katz* v. *United States*, No. 35, this Term] is to be applied to cases pending on appeal on the date of that decision [December 18, 1967], the affirmance of petitioners' convictions cannot stand." However, the Government contends that, on grounds of non-retroactivity, *Katz* should be held inapplicable to this case. We argue the retroactivity issue as such rather extensively in our Point I in this brief, but some of the subsequent points in this brief are also believed to have a bearing on the retroactivity issue, notably points which treat the quality and other sufficiency of the trial proofs (especially the proofs of the alleged content of the Waldorf-Astoria electronic recordings), and which therefore go to the single most important criterion for allowing retroactivity, namely, "the integrity of the fact finding process" as affected by the investigative or prosecutive conduct which has been constitutionally condemned by the new overruling decision (here the *Katz* decision).

2. The chronological structure of the *Katz*-retroactivity issue in relation to the present case is such as to require only a ruling of retroactivity for the benefit of cases still pending on direct review at the time of the decision in *Katz*. Our case was pending on petition for certiorari in this Court before *Katz* was decided. Also, our case involves electronic monitoring which occurred about ten months later than that in *Katz*. And when the Court below affirmed the convictions herein it had already been known for about seven months that this Court had granted certiorari in *Katz*. It is altogether likely that, but for conduct of the Government in delaying disclosure of certain other trespassory elec-

tronic surveillance additional to the Waldorf bugging (resulting in need for a protracted remand-hearing below), our case would have reached this Court in time to be set down for argument together with *Katz*. Our appeals were argued in the Court below January 19, 1967, but were not decided by that Court until October 13, 1967. This passage of nearly nine months time, by far most of which is reasonably attributable to the Government's conduct just mentioned, should be weighed as favoring a fair individualized treatment of the retroactivity problem here, rather than a simplistic treatment based on abstract categories. For example, the three cases, all then pending on direct review, which were argued together with *Miranda* v. *Arizona*, 384 U.S. 436, were all given the retroactive benefit of the new *Miranda* rule.

3. Aside from considerations primarily touching chronology factors as above mentioned, retroactivity is favored here on several fundamental grounds:— (a) The recent decisions on the retroactivity problem, commencing with *Linkletter* v. *Walker*, 381 U.S. 618, appear to have been strongly influenced, on the doctrinal level, by the preference stated in *Linkletter* for the "Austinian" "prospectivity" policy over the "Common Law" "retroactivity" policy; in subdivision B of our Point I (pp. 57 et seq, *infra*) we offer a critique of the Court's adoption of the Austinian approach in which we urge that *Linkletter* misinterpreted the Austinian doctrine, and that this leads to deeply disturbing paradoxes and doctrinal irrationalities in the actual operation of the recent decisions which have favored "prospectivity" in varying degrees. (b) The case of the petitioner in *Linkletter* was not still pending on direct review when *Mapp* v. *Ohio*, 367 U.S. 643 was decided, and the Court in *Linkletter* noted that

in other cases it had in fact been applying the *Mapp* rule to cases still pending on direct review when *Mapp* was decided. (c) While *Johnson* v. *New Jersey*, 384 U.S. 719, 728 discounted the significance of the question of which provision of the Constitution is involved for purposes of allowing retroactivity, *Linkletter* was a Fourth Amendment case and there retroactivity was allowed (or recognized) for cases still pending on direct review. There is no decision by this Court since *Linkletter* (or to our knowledge before *Linkletter*) which disallows retroactivity in Fourth Amendment situations. And, again, the only "retroactivity" needed for our Fourth Amendment case *via Katz* (also a Fourth Amendment case) is the minimal retroactivity for cases still pending on direct review. (d) *In any event, the Johnson case theme that the particular provision of the Constitution involved is not necessarily determinative, apparently meant only that a choice for or against retroactivity would not necessarily favor one provision of the Constitution as against another; Johnson should not be read as meaning that in different cases involving the very same provision of the Constitution disparate results as to retroactivity would be proper.* (e) Furthermore, on the particular Fourth Amendment facts our case can claim to be entitled to stronger constitutional solicitude than the cases of the respective petitioners in *Linkletter* and in *Mapp* itself. *Linkletter* involved only the issue of a search too remote from an arrest to which it was incident, i.e., *Linkletter* did not involve the totally vitiating Fourth Amendment defect of failure to obtain a warrant plus absence of arrest-incidence; and in *Mapp* there was strong factual contention that a search warrant had actually existed. Besides, our case, unlike *Linkletter* or any of the *"Mapp"* group of cases

and their "non-retroactivity" aftermath, involves (as does *Katz*) "search" by the maximally abhorrent method of electronic spying. (f) Indeed our case is stronger even than *Katz*, because there it was found that apparently probable cause had existed which would have justified the issuance of a search warrant, whereas in our case there is nothing in the record to indicate that the agents might have obtained a warrant on probable cause to bug Nebbia's hotel room. (g) As regards the criterion stated in *Linkletter* (and subsequent decisions, *infra*) of looking to the "prior history of the rule" affected by a change-effecting or overruling decision, plus the criterion of looking to the "purpose and effect" of such rule or of changing or abrogating it, police officials in this country have been under "notice" increasingly during the last decade and more that electronic invasions of individual privacy were of profoundly doubtful constitutionality. To allow *Katz* retroactivity in our case would minimally "shock" or surprise law enforcement personages; it would minimally inconvenience or burden such personages, or Courts—the Government concedes in this case (Br. In Opp. p. 12) that the effect upon the administration of justice of a retroactive application of the *Katz* principle "would not be of the same dimensions" as in the prior cases involving the retroactivity question, and surely these "dimensions" would be even less as applied to cases of the still-pending-on-direct-review category (in this very case of ours, moreover, it is not even likely that a remand is needed if *Katz* is applied, as the fatally tainting effect of the Waldorf bugging is demonstrably "set" on the existing record). (h) Further considering the above mentioned criteria of "history of the rule" and its "purpose and effect", there is the question of "police deterrence". The purpose of such

deterrence would be notably served by a retroactivity ruling here. We deal here with almost uniquely abhorrent police conduct. *Katz* should be made retroactive at least for cases still pending on direct review—and preferably also for cases still in direct trial or other post-indictment litigation at the time *Katz* was decided—because policemen need to be told that they may not with impunity go on using so morally odious and forewarnedly unconstitutional a method of investigation down to the last possible moment until a Court of final resort decides to stop them. They should be told that they are not going to be indulged in salvaging the product of such immoral and unconstitutional malefactions which they deliberately continued down to the last possible moment, lest otherwise there occur, in all of the as yet unknown future possible situations of improvement of constitutional standards of prosecutive decency, a renewal of the same cynical police calculational strategies, with accompanying further injustice to victims and, perhaps more important, further corrosion of governmental and public morality. (i) In *Stovall* v. *Denno,* 388 U.S. 293, it was stated that one important factor in deciding how to handle retroactivity problems is "the possible effect upon the incentive of counsel to advance contentions requiring a change in the law". How can counsel avoid "deterrence" of this very "incentive" functioning so praised and welcomed in *Stovall,* when counsel can never know whether, after their most ardent exertions actuated by such "incentive", counsel may at the end find themselves (and their clients) utterly thwarted only because they have "lost a race" with other counsel pursuing the same honorable objective of a constitutional improvement in the law. (j) The Government has urged (Br. In Opp., p. 12) that the fruits of this par-

ticular prosecution based on electronic bugging should be saved because the case is so big and important. Such reasoning would allow the police to keep any such major triumph no matter by what monstrous constitutional violations obtained. This argument of the Government is one of those arguments which prove too much. (k) In *Linkletter* the Court quoted from *Mapp* the phrase "the imperative of judicial integrity"; *Mapp,* of course, was speaking of impingements of unconstitutional search upon such "judicial integrity". Further in *Linkletter* (and in the subsequent retroactivity decisions, *infra*) the Court set up the criterion of the "integrity of the fact finding process", noting in *Linkletter* that the fairness of the trial was not under attack, nor was the reliability or relevancy of the evidence. In our case the "integrity of the fact finding process" is vigorously challenged, by reason of, *inter alia,* the hopeless acoustical and French-English translational problems in connection with the electronic tapes—which moreover were undisputedly indispensable in bringing about the convictions, whereas in *Linkletter* it was stated that the search-obtained evidence "may well have had no effect on the outcome" . (l) Our case, being a Federal prosecution, involves no problem of the "delicate State-Federal relationship" which was deemed important as disfavoring retroactivity in *all* of the decisions from *Linkletter* on (*Tehan, Johnson, Stovall, infra*). Indeed ours appears to be the first case that has come before this Court on the merits of the purely Federal aspects of retroactivity—*Miranda-Johnson,* we realize, have had Federal consequences, so that even qualifying our latter statement, we may say that ours is the first case that has come before this Court on the merits for explicit consideration of the purely Federal aspects of *Fourth*

Amendment retroactivity. This in turn means that in weighing the retroactivity problem here the Court may exercise its power to "supervise the administration of Federal criminal justice". (m) *Tehan* v. *Shott*, 382 U.S. 406, gave retroactivity (of *Griffin* v. *California*, 380 U.S. 609) to cases still pending on direct review. (n) *Johnson* v. *New Jersey*, 384 U.S. 719, preserved for possible retroactive protection on a case-by-case basis, situations which might arise involving issues as to the coercion or involuntariness of statements taken from accused persons by police questioners. This "voluntariness" reservation in *Johnson* merits consideration as favoring retroactive application of *Katz* to our case. *Warden, Maryland Penitentiary* v. *Hayden*, 387 U.S. 294, rejecting the "mere evidence" rule, nevertheless reserved for future consideration the question of applicability of the Fourth Amendment to items of a "testimonial" or "communicative" nature, or "items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure" in violation of the Fifth Amendment self-incrimination clause. Since electronic eavesdropping yields precisely this kind of "testimonial" products of "search", we invoke the "involuntariness" reservation of *Johnson*, combined with the *Hayden* reservation just mentioned, as further favoring retroactive application of *Katz* to our case. (o) Similarly, since we are challenging the "reliability", that is the probative accuracy, of the Waldorf tapes, which contained the equivalent of alleged admissions by some of the petitioners, and since *Johnson* spoke of the need to assure the trustworthiness of confessions (owing to their persuasiveness with a Jury) as being a factor in favor of retroactive protection in "involuntariness" cases, we contend that the

probative untrustworthiness of the Waldorf tapes likewise favors *Katz*-retroactivity here. (p) The direct *holding* in *Stovall* v. *Denno*, 388 U.S. 293, refusing retroactivity to the petitioner there, was on a factual situation of direct review proceedings having already been completed; therefore the *Stovall holding* is not opposed to our request for retroactive application of *Katz* to our case as being one still pending on direct review. Insofar as the more generally worded pronouncement in *Stovall* denies retroactivity for cases still pending on direct review, see our argument at pp. 84-85, *infra*, where we suggest grounds for distinguishing this general "dictum"-type ruling of *Stovall*. (q) Denial of retroactivity here would, paradoxically, result in retroactively validating the Waldorf bug despite its having been in violation of New York State legislation (N.Y. Penal Law, §738). There are eight States which have such legislation. (r) The *Katz* decision did not refer to the Ninth Amendment, which we raise here as supplementing the Fourth Amendment's protection against improper invasion of individual privacy. Should this case be decided in our favor on such additional or independent point of constitutionality not governed by *Katz*, the *Katz*-retroactivity problem would become academic for our case. (s) In two recent decisions of the Seventh Circuit (p. 87, *infra*) it has been taken for granted that Katz is retroactive in the fullest sense; also a recent Fifth Circuit decision (p. 87, fn., *infra*), while declining to apply *Katz* on the merits (to extension-telephone surveillance), did not treat such application as precluded on any ground of non-retroactivity. (t) The *Katz* decision itself rejected the Government's argument there that the agents' conduct should be retroactively validated because they relied on earlier decisions allegedly permitting "non-

trespassory'' bugging. (u) Our case was originally set down for argument immediately following *Lee* v. *Florida*, No. 174, this Term. The structure of the issues in *Lee* is such that that case may produce a decision of renewed plenary Fourth Amendment scope which could have been applicable to our case on a ''companion'' basis without needing to consider *Katz*-retroactivity. (v) Finally, and perhaps most important for the retroactivity problem here, in weighing the relative policy values of constitutional justice to individual criminal defendants as against convenience of Courts and government officials, the question should be asked whether greater ''burden'' or ''stress'' is exerted on a governmental society of the Western democratic-humanistic type of ours, by incurring the judicial and administrative burdensomeness of ''retroactively'' reviewing criminal convictions, or by enduring the distintegrative spiritual consequences of encouraging the non-jailed multitudes of the society to turn their backs on their unconstitutionally jailed brethren. The choice is, must be, between ''convenience'' of the Government, and *rightness* of governmental behavior.

4. Even if *Katz* should be held inapplicable to this case on grounds of non-retroactivity the convictions should be reversed because of unconstitutionality of the Waldorf electronic proofs under pre-*Katz* standards, i.e., on the basis of accepting as true the Government's description of how the Waldorf bugging was carried out. That bugging, as described by the Government's witnesses, effected, we claim, a ''parabolic mike'' intrusion into Nebbia's hotel room, because the bugging utilized a special privacy-designed air space between two doors. It also utilized the ''common appurtenance'' of the hotel electric current. It was also preceded by an actual physical invasion of the privacy-pro-

tected air space between the two doors. And it was made possible, in the first instance, only by treacherous complicity between the hotel management and the agents, which betrayed Nebbia's trust that his privacy would be protected by his hotel host, for the hotel officials surreptitiously enabled the agents to station themselves deliberately in the room adjoining Nebbia's. Pre-*Katz* decisions of this Court, especially *Silverman* v. *United States,* 365 U.S. 505, which departed from the strict "physical trespass" rule, and *Osborn* v. *United States,* 385 U.S. 323, which upheld a minifon-type (non-trespassory) monitoring only because the Fourth Amendment search warrant procedure had been complied with, denote such pre-*Katz* standards.

5. If it should be deemed that the present record does not affirmatively show violation of pre-*Katz* standards, there is nevertheless more than enough indication in the present record—including extremely disturbing evidence that the agents did not tell the truth about how they did the Waldorf bugging—to require a remand for a new plenary hearing to determine whether in fact the Waldorf bug was "trespassorily" installed in Nebbia's hotel room. On the present record the findings of both of the Courts below that the bugging was carried out in the manner claimed by the Government are profoundly unsatisfying.

6. The belated disclosure by the Government of trespassory bugging additional to the Waldorf incident, resulted in a remand order by the Court of Appeals for a further electronic hearing. But the Court of Appeals excluded from such remand hearing the Waldorf incident. This was reversible error, because of the above mentioned extremely unsatisfactory posture of the record on the question of what the Government had actually done in the course of the

Waldorf bugging. This remand order of the Court of Appeals was made after the *"Schipani"* review program had come into existence. The pretrial Waldorf-bug hearing had been completed before *"Schipani"*.

7. In any event, the hearing on remand was procedurally inadequate and unfair. We go so far as to say, in all respectfulness, that it was a fiasco of due process. The Government in that remand hearing succeeded in evading any real duty of disclosure of meaningful details of the trespassory buggings (additional to those at the Waldorf) which it admitted having perpetrated.

8. No effect at all was given, in the Courts below, to President Johnson's order of June 30, 1965, addressed to the entire Federal law enforcement establishment, forbidding electronic surveillance. Indeed, to this moment, complete secrecy—evidently insisted upon by the Government and condoned by both of the Courts below—continues to shroud even the question of what were the terms and provisions of the President's order. If, as may well be the fact (which the Government has thus far not seen fit to deny), President Johnson's order was violated by the Waldorf bugging herein, the case presents an outright usurpation of executive power which, in turn, violated due process of law in the most classic sense. The act of a governmental usurper not only is not "due" process of law, it is not any kind of process of "law" at all.

9. The acoustical and French-English translational difficulties in connection with the Waldorf electronic tapes destroyed their probative acceptability. The Jury, under the procedures insisted upon by the trial Judge over defense objection, got their only knowledge of what was in those

tapes from the *ipse dixit* testimony of Narcotic Agent Kiere who had both recorded and "translated" the Waldorf conversations (which were in the French language), and who testified before the Jury as to what he heard and translated. Defense requests for a Court-appointed impartial translator were denied. The problem of the reliability of the Waldorf-bug testimony* touches, as previously mentioned, not only the issue in this case as to sufficiency of the evidence, but also the issue as to "integrity of the fact-finding process" from the standpoint of the retroactivity criteria.

10. Sufficiency of the evidence specifically as to Dioguardi and Sutera is treated in Points IV and V *infra*. In Point IV we note that, as the trial Court instructed the Jury, Dioguardi and Sutera had to be acquitted unless the Jury found sufficient evidence of their knowledge of importation of narcotics. Such evidence could come only from the Agents' testimony concerning the alleged Adano Restaurant conversation, and this testimony, we submit, was practically incredible as a matter of law. Furthermore, in that testimony, literally only one item could be deemed relevant or material to the issue of knowledge of importation, to wit, LeFranc's words "It is here already" when Dioguardi or Sutera asked him when the "merchandise" would be available. Dioguardi and Sutera have been sentenced to fifteen and ten years, respectively, on those four words, without more. We show in Point IV that those words are egregiously ambiguous and probatively insufficient in themselves and in the light of the record as a whole, on the issue of knowledge of importation. We also urge in Point VI that petitioners were denied a fair trial by the improperly selec-

* It took Kiere *75 hours* to "transcribe" the *45-minutes* of tapes.

tive way in which the Court responded to jury questions concerning this branch of the case.

11. Petitioner Nebbia (and by prejudicial derivation, the other petitioners) was denied a fair trial by the Court's refusal to furnish him with the assistance of a Court-appointed French-English interpretor. We argue in Point VII that the consequence of this was to subject Nebbia, for all practical purposes, to the status of a deaf mute in this trial, in violation of his constitutional rights. The Trial Court's action in this regard was especially inexcusable in view of procedural recourses which were available under the then imminent new Federal Criminal Rule 28(b), which contains express built-in provisions for retroactive application to pending cases.

12. Petitioner Nebbia was denied a fair trial by an instruction to the Jury which amounted, we contend, practically to a direction that the Jury find that Nebbia's voice had been identified in the Waldorf tapes. A supposedly "corrective" instruction stated in wholly general terms, without referring to the specific damaging instruction just mentioned, was inadequate to allay this injustice. The injustice was the more grave because the electronic tapes were so prominent a part of the Government's proofs, and because they were so probatively poor. This is, also, one further factor supporting our retroactivity argument on the score of "integrity of the fact finding process".

13. All petitioners challenge the sufficiency of the evidence.

ARGUMENT

Introductory to Argument

Some of the points in our Questions Presented which would otherwise stand distinct from the electronic eavesdrop constitutionality issues, blend into the latter issues owing to the problem of whether to apply "retroactively" or "prospectively" the recent *Katz* decision of this Court, No. 35, this Term. For example, our Question 7, concerning audibility and translation of the French-language eavesdrop recordings, is believed to have a prime bearing on the retroactivity question because the sheer truthfulness or "integrity" of the trial proofs in this case is at issue by reason of the acoustic condition of those recordings (Point III, *infra*)—such "truth" and "integrity" considerations being prominent in the contemporary "retroactivity" decisions of this Court (*infra*). Similarly, as to at least two of the petitioners, Dioguardi and Sutera, a substantial question is presented of adequate proof of their guilt, so that the case involves also the problem of whether a purely "prospective" operation of *Katz* would result here in denying relief to people whose guilt may not have been proved beyond a reasonable doubt; and, derivative from this problem of the dubiously proved guilt of Dioguardi and Sutera, is a *pro-tanto* problem as to adequacy of the proof of conspiratorial guilt of the other three petitioners, who challenge the sufficiency of the evidence on other grounds as well (Points IV, V, VIII, IX, *infra*).

We are mentioning in this Introductory to our Argument these examples (there are others—*infra*) of the interplay of the *Katz*-retroactivity issue with other issues in the present case because we shall be arguing the retroactivity issue as

our first Point of Argument herein, Point I, *infra;* and since the merits of those other, interplaying issues will not become fully apparent until later in the brief, we ask the Court to read Point I with these conditions in mind as to the sequence of the several Points in this Argument.

POINT I

The Government has conceded that unless the principle of *Katz v. United States,* No. 35, this term, is held inapplicable to this case on grounds of non-retroactivity, petitioners' convictions cannot stand owing to the Waldorf-Astoria Electronic Eavesdropping.

***Katz* should be held to require a reversal in this case.**

A. Introductory To Point I: The Structure Of The Issue Of Retroactivity *Versus* Prospectivity In This Case.

We take it that there is not, and cannot be, any dispute as to the materiality of the Waldorf-Astoria eavesdrop proofs in bringing about the convictions of the petitioners. The Government has so conceded in this Court (Br. In Opp. p. 9—"If the principle announced in *Katz* is to be applied to cases pending on appeal on the date of that decision, the affirmance of petitioners' convictions cannot stand.").*

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* The Government also mentions in the Brief In Opposition, p. 9, fn., that Dioguardi and Sutera were not present during the Waldorf-Astoria bugging; the Government's language as to this is in apparently guarded words—"We note, however, that no rights of petitioners Dioguardi and Sutera were violated by the overhearing" (*ibid*). But evidently the Government raises no issue as to the standing of Dioguardi and Sutera to participate in the challenge to the constitutionality of the Waldorf bugging. Any point on that score in the present case would seem to be settled anyhow by the plenary standards of disclosure and review, affecting both standing and materiality, illustrated in cases such as *O'Brien and Parisi* v. *United States,* 386 U.S. 345, and *Kolod* v. *United States,* U.S. , 19 L.Ed.2d 962. We showed in our

The chronological structure of the *Katz*-retroactivity issues here is as follows:— *Katz* was decided by this Court on December 18, 1967. Our joint petition for certiorari herein was filed December 12, 1967, six days before the Court decided *Katz*. Thus, to begin with, our case, in relation to the *Katz*-"retroactivity" problem, is in the category of cases which were still pending on direct review on the date *Katz* was decided. Incidentally, as will appear *infra*, but for conduct of the Government in delaying disclosure of other trespassory electronic surveillance additional to the Waldorf bugging, our case almost surely would have reached this Court in time to be set down for argument together with *Katz*. The certiorari in *Katz* was granted March 13, 1967. The appeal in our case was argued in the Court of Appeals January 19, 1967, but owing to the Government's belatedness in disclosing the additional eavesdropping (which it disclosed for the first time about two months after the appeal was argued) and remand proceed-

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statement of the case, *supra*, not only that this prosecution in its overall or generally-viewed entirety, as to all of the petitioners, is indispensably dependent on the Waldorf bug-produced proofs (at R.2244 the Prosecutor told the Jury in summation that "Without Nebbia we had no case, * * *. He was the one we latched onto at the outset. He was the one who had the conversations with Desist and LeFranc. It was through these conversations that we heard about the merchandise. It was through these conversations that we heard about Atlanta and the Black Angus and the rest of it."), but also that as to Dioguardi and Sutera the sole proof directly concerning them (the Adano Restaurant conversation between them and LeFranc) was obtained by the agents when they shadowed LeFranc after having bugged the latter's conversation with Nebbia at the Waldorf earlier that same day. Of course as to LeFranc himself, and likewise as to Nebbia and Desist, there is no problem at all of "standing". LeFranc and Desist were guests in Nebbia's hotel room (the Government claims) during the Waldorf bugging here in issue, and all three participated (allegedly) in the respective bugged conversations here involved.

ings consequent thereon, our case was not decided by the Court of Appeals until October 13, 1967.

Thus, exactly seven months before the Court below in our case rendered its decision affirming the narcotics convictions (October 13, 1967), that Court and all the world knew that this Court had granted certiorari in *Katz* (March 13, 1967). Another operative fact of chronological interest here is that the non-trespassory electronic spying which this Court condemned in *Katz* took place a considerably longer time ago than the claimedly non-trespassory electronic spying in our case; the *Katz* eavesdropping took place in February 1965 (369 F.2d at p. 131); the eavesdropping in our case took place in December 1965. Which Judge or which lawyer would relish the task of explaining to an intelligent layman exactly why an act of electronic snooping done in February 1965 stands constitutionally condemned, but an indicatedly much more obnoxious bit of electronic snooping done nearly ten months later may not be thus condemned, and that the reason has to do with a dislike for "retroactivity"? Shall the present petitioners who were electronically spied upon nearly ten months after Charles Katz was, be denied constitutional protection because, through the vagaries of Court procedure, our case lost a race with *Katz* towards United States Supreme Court certiorari? Cf. Mr. Justice Black's discussion of the similar problem of the disparate treatment accorded to "Miss Mapp", and to the petitioner in *Linkletter* v. *Walker*, 381 U.S. at 640-642 (dissenting op.).

These chronological considerations affecting our case *vis-a-vis Katz* should be evaluated also with reference to the contemporaneous indications, which for a long time have been plain for all to see, that both Federal and State

police had plenty of cause during the times pertinent to this prosecution to feel profoundly unsure about the continuing "lawfulness" of so-called non-trespassory electronic bugging; conspicuous public agitation, on many social and institutional levels, and conspicuous ferment in the Courts, have been going on concerning the whole execrable business of electronic snooping with crescendo intensification since at least the mid-1950's; see our more detailed presentation of this theme, *infra,* and cf. this Court's solicitous notice of comparable forewarning developments in other "retroactivity" disputes of the recent period, e.g., *Linkletter* v. *Walker,* 381 U.S. 618, 633-634, with which contrast on this point *Tehan* v. *Shott,* 382 U.S. 406, 412-413.

Nor is the non-retroactivity decision in *Stovall* v. *Denno,* 388 U.S. 293, unfavorable to the chronological considerations which we are here posing in relation to *Katz vis-a-vis* our case, because even though *Stovall* was pending in this Court concurrently with *United States* v. *Wade,* 388 U.S. 218, and *Gilbert* v. *California,* 388 U.S. 263 (which announced the changed rules as to identification procedures), and indeed was decided the same day, *Stovall* was not thus pending on direct review, but only on collateral (post-conviction) review. The same is true of *Johnson* v. *New Jersey,* 384 U.S. 719, in relation to *Miranda* v. *Arizona,* 384 U.S. 436, which was decided only one week before *Johnson* —and we suppose it may be an open question as to what this Court would have done in the *Johnson* case if that case, which was argued, apparently, immediately following *Miranda,* had been pending on direct review; in fact, the three companion cases argued with *Miranda,* all of which were pending on direct review, were all given the benefit of the new *Miranda* rule. In light of these last mentioned facts

can there be any doubt that if the Government had not made unavoidable a slowing-down of the direct review proceedings in our case—i.e., through the Government's foot-dragging tactics in its electronic disclosures (details *infra*) —and our case had reached this Court in time to be argued together with *Katz,* as almost surely would have happened but for the Government's behavior just mentioned, we would right now stand in full beneficiary *companion* enjoyment of the *Katz* rule, just as happened in the companion cases heard and decided together with *Miranda*?

If chronological considerations count, then, especially when they arise in so close and acute a setting as is here presented, at the very least the "retroactivity"-policy choice in favor of cases pending on direct review ought surely to be exercised by the Court here. Our case is not off somewhere in a "category" of which a merely statistical or abstract general view may be taken from the standpoint of feared impact upon the conveniences of judicial administration or of prosecutive authorities (see our further discussion of this theme *infra*). Our case was lodged in this Court before *Katz* was decided, and it is before this Court now. Nor should it be overlooked that (details *infra*) our case, since May 1966, when the Government first disclosed the Waldorf bugging and the pre-trial motion proceedings on that subject were launched, has expressly thrust forward the constitutional issue of that bugging, and has continued to do so at all subsequent stages. The blunt fact is, then, that our case actively and intensively involved the Waldorf bugging issue on a litigated basis nearly a year before certiorari was granted in *Katz.*

However, we realize that, in the light of the decisions from *Linkletter* to *Stovall, supra,* announcing this Court's

reservation of a power to select among retroactivity-prospectivity choices on a policy basis, it would be foolhardy for us to assume that we are going to be treated here on the "direct-review-pending" basis, rather than on some basis of "prospectivity" which might close us off from participating in the benefits of *Katz*. We are therefore obliged to address ourselves to the retroactivity problem in a more comprehensive way, and we do so under subsequent headings in this Point I. In proceeding now to the more comprehensive presentation of the retroactivity issue, we respectfully ask the Court to have in mind, again, that substantial factual materials in the present record which are needed for full consideration of this issue have to be deferred until later pages in this brief in the interests of proper sequence affecting issues not confined to the retroactivity problem.

B. Analysis Of The "Retroactivity" Decisions Of This Court From *Linkletter to Stovall; Austinian Postivism versus The Common Law.*

May we begin this analysis of the Court's recent "retroactivity" decisions in the cases involving changes of constitutional principle in the criminal field, by offering these remarks:

The Court wrote in *Linkletter* v. *Walker*, 381 U.S. 618—where the Court first gave systematic attention to the "retroactivity" problem in the current era—that the basic policy alternatives affecting choice between retroactivity and prospectivity have been those favored, respectively, by the Blackstonean Common Law doctrine (favoring retroactivity) and the "positivist" doctrine of the Austinian jurisprudence (favoring prospectivity). Progressively, indeed almost by a geometrical progression, this Court's deci-

sions in the few short years from *Linkletter* to *Stovall,* have approached a literal Austinianism, to the point now where *Stovall* seems to go about as far as John Austin himself might have wished—short of the ultimate position, *viz.,* the position of denying even to the winning party in the overruling case the benefit of such overruling; in *Stovall* the Court stopped just short of this ultimate Austinian position, adducing Article III of the Constitution and anti-"dictum" considerations as compelling such a halt.

It is good that the Court has halted its Austinianism, in *Stovall,* just short of such ultimate, doctrinaire Austinian perfectionism. We respectfully suggest that the time has come also, in this short and perhaps impetuous recent history from *Linkletter* to *Stovall,* for the Court to consider not only a halt but a retreat; and we respectfully think also that this present case of ours may afford a particularly appropriate vehicle for that purpose.

We have not seen in any of the decisions from *Linkletter* to *Stovall,* a mention of the "major premise" of Austinian positivism; namely, the doctrine of "parliamentary sovereignty", i.e., the doctrine of the literally absolute sovereignty of the "Crown in Parliament". The prodigious influence which the thinker John Austin exercised over so many of his contemporaries, and onward among subsequent generations of Anglo-American lawyers, can be best understood when reference is had to this Austinian concept of an absolute parliamentary sovereign. For, behind that concept in turn stands the anterior ideal of the *popular sovereign.* In other words Nineteenth Century Austinian positivism won and has continued to win so many influential adherents among *democratic* legal thinkers of good

will, because Austin's doctrine was "democratic" in its primal doctrinal presupposition.

Needless to say, our system of law and government in this country is likewise based upon a doctrine of ultimate "popular sovereignty"—but with important, very important, qualifications. Constitutional theoreticians assure us that our State Legislatures are the inheritors of the plenary, residual "parliamentary sovereignty" of the English "Crown in Parliament"; and that our "granted" Federal governmental powers, likewise, stem from the same ultimate source, albeit more complexly, *via* the combined Power of the "People" and the "States" who ordained the United States Constitution and retain a practically plenary power to amend that Constitution. But our constitutional theoreticians also teach us the equally important truth that, in the existing constitutional framework in this country, and with respect to both the States and the United States, we are a governmental society of *constitutionql limitations*—we are not, at any given time or in any given exercise or impingement of governmental functioning in this country (State or Federal), a supra-constitutional "parliamentary sovereignty".

When the above summarized axioms of our constitutional system in this country are recalled, it appears that John Austin may really have very little to do with American constitutional theory, or, at least, that John Austin may lead us astray in our own thinking as *American* constitutional theoreticians unless we guard "with eagles' eyes" against a simplistic Austinianism.

The dilemmas posed by Austinian thinking to the minds of American Judges and lawyers have proved most difficult

of solution and most productive of debate in the area of judicial enforcement of constitutional limitations, and more particularly in judicial review of the constitutionality of legislation. A literal, puristic Austinianism would wish to hear nothing of such judicial review for enforcement of constitutional limitations; all law-declaring power, in a pure Austinian system, belongs to "Parliament". Hence writers like Mr. Dicey (*The Law of the Constitution*) never tired of reminding their readers that the English Courts do not "judicially review" English legislation. This Austinian abstemiousness in the matter of judicial monitoring of "parliamentary" legislation has generated, in this country, the judicial philosophy exemplified in Mr. Justice Holmes. But the Holmesian positivism aimed at a quite uncomplicated judicial abstemiousness, for Mr. Justice Holmes wanted Courts to allow to *legislatures* a maximum expansiveness of law-declaring discretion. Our point in this paragraph is that the one arguably workable way that Austinian (or Holmesian) positivism may operate *judicially* in our system is through judicious selectivity by Judges in striking down legislation as unconstitutional. It is very hard to see how this positivist philosophy can be invoked by American Judges as justification for new *Judge-made* law on some explicit "positivist" notion that Courts in this country share with legislatures in an Austinian-favored power to "posit" new or changed rules of general law. True, American Courts do exercise such power, they do so rightly (in our humble opinion), and it will be an ill day if we should ever lose this protective and creative judicial power to help law keep on evolving for effectuation of our democratic-humanistic social values. But it is odd to hear Courts say that this salutary judicial power to keep the law

continuingly alive and alert to mankind's needs, is an "Austinian positivist" power. This all-to-be-desired judicial power is nothing other than a derivative from the powers of the English Courts to declare the Common Law, a power which in this country has furthermore been brought to maximum functioning thanks only to a doctrine diametrically opposed to "parliamentary" Austinianism, the doctrine of "judicial review" for the enforcement of constitutional limitations.*

Let us now pick up the threads of the above legal-philosophical observations to tie in with the retroactivity problems of the present case. In *Linkletter*—and, again, most recently in *Stovall* (by reference to *Linkletter*)—the Court avowed its preference for what it termed the Austinian rather than the Common Law approach. In Mr. Justice Clark's opinion for the Court in *Linkletter,* the Austinian and Common Law approaches were suggested as respectively posing alternatives between (1) the power of Courts to attach "prospective" effect to decisions, and (2) their power to attach only "retroactive" effect to decisions; and, as we read *Linkletter,* it was on the basis of this counter-

* To cite "authorities" for our above disquisition on Austinian and Holmesian positivism would be to weary the reader with the all-but-endlses bibliography of the writings of American and English legal philosophers of modern times. The subject has been so much threshed in the writings that perhaps we may take the liberty of supplying a minimum of scholarly annotations: Pound, *The Spirit Of The Common Law* (1921); T. E. Holland, *The Elements Of Jurisprudence* (12th Ed.) (1917); A. V. Dicey, *The Law Of The Constitution;* Jerome Hall, *Living Law Of Democratic Society* (1949); Holmes, *Collected Legal Papers* (1920); Rudolf Stammler, *The Theory Of Justice* (1925); Lon L. Fuller, *The Law In Quest Of Itself* (1940); Edmond N. Cahn, *The Sense Of Injustcie* (1949); Julius F. Stone, *The Province And Function Of Law* (1946).

poising of the meanings of Austin as opposed to the meanings of the Common Law approach that the majority opinion in *Linkletter* found authority in the Austinian doctrine to support the enunciation in *Linkletter* of the principle that the Constitution neither requires nor supports "retroactivity" and that American appellate Courts of last resort are free to choose between retroactivity and prospectivity on sufficiently considered pragmatic policy standards.

We do not think that we are being hyper-technical or resorting to mere legal-historical "scholasticism" in now suggesting, as we respectfully feel we must do, that the Court's handling (*per* Mr. Justice Clark) of the doctrinal materials in *Linkletter* was unhistorical. Our above summary of the doctrinal derivations and meanings of Austinian positivism suggests the desirability of a reexamination of the historical-doctrinal problem by the Court. The question is, is Austinian theory relevant at all to this Court's preference (in the series of cases from *Linkletter* to *Stovall*) for exercising its power prospectively rather than retroactively? Is this invoking of the authority of Austinian positivist "prospectvity" sound, in such situations, when it is remembered that the Austinian doctrine of a power to declare law-changes was a doctrine for *legislators* not for Courts—as we above suggested, the essence of Austin's philosophy was the concept of a plenary and absolute parliamentary sovereignty which was in turn but the agent of a likewise plenary and absolute popular sovereignty.

We respectfully ask the Court to consider that the last place in our American constitutional system where oversimplified Austinian ideas of exclusive "prospectivity" in

"law-making" should ever be allowed to operate is in the area of Court decisions. In the judicial field the nearest one may come to speaking of an Austinian function is in those cases where a Court gives effect to statute-declared or constitution-declared "legislation"; in that situation a Court serves the Austinian "popular sovereign" in the most classic sense. But this last, in turn, means that when a Court overrules a prior decision as having been erroneous under the Constitution, *Austinianism itself seemingly should demand "retroactivity" in applying the overruling decision.* For, a constitution, being "legislation", has to be given *prospective* effect from the time of its enactment, according to Austinian theory. In other words, not the prior constitutionally erroneous and now overruled court decision, but the constitution which has commanded such overruling, was the necessarily operative "law" all along—and, again, this according to Austinian theory. Viewing the situation in this way, we see the seeming paradox that the supposed rule of Austinian prospectivity as discussed in cases like *Linkletter et post* is actually a repudiation of Austinian theory because it denies to the Constitution itself a "prospective" Austinian operation; that is, paradoxically, cases like *Linkletter* and *Stovall retroactively* destroy the original *prospectivity* of the Constitution.

There is another paradox. *Linkletter* did not come decisionally upon the legal scene until June 1965. Before that, what *Linkletter* terms the Common Law approach, rather than what *Linkletter* terms the Austinian approach, was paramount in this Court's decisions on problems of retroactivity *versus* prospectivity. Hence it may be said that prior to June 1965 (*Linkletter*) there was a "presumption" in favor of retroactivity. Since *Linkletter's* abandonment of

this "presumption" dates from less than three years ago, and since the *Linkletter et post* series of cases are believed by us to be subject to serious criticism, we urge that, notwithstanding the latter decisions, the attitude ought to be that any further proposed decisional choice in favor of non-retroactivity in a criminal case must justify itself as against the above suggested "presumption" in favor of retroactivity. We submit that this Court's decisions from *Linkletter* to *Stovall* are too recent, of too dubious a historical-legal soundness, to deserve unchangeable continuing acceptance by this Court as against the long-accepted previous tradition of retroactivity.

One more paradoxical aspect of the situation may be mentioned. Since, again, prior to *Linkletter* criminally accused or imprisoned persons had every reason, encouraged by authority and tradition, to expect that a changing or overruling decision by a court of appellate last resort would operate retroactively, the alteration by this Court of the principles affecting such expectancy, an alteration which abruptly commenced less than three years ago, operates to take away from such expectant or hopeful criminal defendants or prisoners a "vested right" of such expectancy or hope which they had reason to believe belonged to them under the pre-*Linkletter* condition of the law. Cf. the references to such "vested rights" aspects in the *Linkletter* case itself, 381 U.S. 618, 636, and in the dissenting opinion at p. 645. Paradoxically, then, this Court's evolving treatment of the problem of retroactivity in the recent short period starting with the *Linkletter* decision, in which the Court has called attention to the need to avoid undue disruption of "vested" statuses, has been resulting, inadvertently perhaps, in taking away from criminal defendants or prisoners

that very "vested" interest which the pre-*Linkletter* cases secured.

Having perhaps tediously burdened the Court with our above remarks on the philosophical side of the subject, we would now mention that we realize the present case in all probability is not going to be decided on such philosophical considerations as regards the problem of retroactivity *versus* prospectvity of the *Katz* ruling *vis-a-vis* our case; and that more concrete considerations will probably govern the decision here. Nevertheless, we have deemed it desirable to try to eliminate from the doctrinal debate in this case an indicatedly erroneous view of the problem of John Austin *versus* the Common Law.

We turn now to a more systematic discussion of the four recent retroactivity-prospectivity decisions (*Linkletter, Tehan, Johnson, Stovall*).

In *Linkletter* v. *Walker,* 381 U.S. 618, the petitioner's conviction had become final prior to the *Mapp* case, i.e., *Linkletter* was not still pending on direct review when *Mapp* was decided. The holding of *Linkletter* was that the *Mapp* rule would not be given retroactive operation upon cases finally decided prior to the *Mapp* case, but the Court noted that in other cases it had in fact been applying the *Mapp* rule to cases still pending on direct review at the time the *Mapp* decision was rendered (381 U.S. at 622, fn. 4). Several other facets of *Linkletter* deserve special notice here.

While we are aware that in *Johnson* v. *New Jersey,* 384 U.S. 719, 728 (further discussed *infra*), the Court said that retroactivity or non-retroactivity is not automatically determined by the provision of the Constitution involved in the case, it may be significant of the Court's pattern in these

cases thus far that it did, in *Linkletter,* give partial retroactivity to an overruling decision in the area of Fourth Amendment search and seizure problems. Our case, too, arises under the Fourth Amendment, and *Katz* was decided under the Fourth Amendment. The partial retroactivity allowed in *Linkletter*—to apply to cases still pending on direct review at the time of the *Mapp* decision—would be sufficient to extend to our case the ruling of *Katz.* Direct precedent for this exists on the rational and persuasive basis that our case, like *Mapp-Linkletter,* involves the Fourth Amendment.

We think it may be especially important to note that when the Court in Johnson (supra) said the particular provision of the Constitution involved is not necessarily determinative, all that the Court apparently meant was that a choice for or against retroactivity would not necessarily favor one provision of the Constitution as against another; but we do not think the Court meant that in different cases involving the same provision of the Constitution differing results as to retroactivity might be proper.

We therefore urge that on the basis of common involvement of the same constitutional provision (Fourth Amendment protection of individual privacy against unreasonable search) in *Mapp, Linkletter, Katz* and our case, the principle of partial retroactivity (cases still pending on direct review) should be applied here directly on the authority of *Linkletter,* nothing more being needed to dispose of the question in petitioners' favor in this case.

However, in our case the considerations favoring such a result are stronger than in *Mapp-Linkletter,* as will be shown after we first further note more of the Court's reasoning in *Linkletter.*

In stating the facts in *Linkletter* the Court recited that the lower Court proceedings presented, as the specific Fourth Amendment objection in that case, that the arrest-incident search involved (the arrest having been held by the Louisiana State Courts to have been based on reasonable cause under State law) was too remote from the arrest (381 U.S. at p. 621). Thus, *Linkletter* did not involve a search of a type wholly outside the standards of the Fourth Amendment, i.e., while the search was too remote from the arrest, the search was not regarded as bad for failure to obtain a warrant, because the search was or may have been sustainable as incident to the lawful arrest. We are emphasizing this item in the *Linkletter* facts because *Katz* turned on the factor of the lack of a warrant for the electronic search, nor was there any arrest-incidence factor in *Katz* either; and the same is true in our case, where there is no search warrant and no arrest to which the search was or might be tacked. What we are saying is that the invalidity of the respective searches in *Katz* and in our case touches an even more fundamental part of the Fourth Amendment system than the search in *Linkletter*, and we suggest that this should be regarded as significant for the issue here presented. It may be noted also that in *Mapp* itself (367 U.S. at p. 645) there was factual dispute as to whether a search warrant had in fact existed. It is interesting also to note the search facts in the three cases mentioned in *Linkletter* (381 U.S. at p. 622, fn. 4) which first applied *Mapp* to cases still pending on direct review. In *Ker* v. *California*, 374 U.S. 23 the search was arguably incident to a lawful arrest. In *Fahy* v. *Connecticut*, 375 U.S. 85, the search was wholly outside Fourth Amendment standards (no search warrant and no arrest-incidence), as in

Katz and our case. In *Stoner* v. *California*, 376 U.S. 483, the search facts were similarly wholly outside the Fourth Amendment.

Consideration should also be given, in weighing the comparative gravity of these various search-fact situations, to the circumstance that *Katz* and our case involve "search" by the maximally abhorrent method of electronic spying, added to the total failure of compliance with the Fourth Amendment either as to search warrant or arrest-incidence.

Indeed our cases is stronger even than *Katz* as regards the procedural high-handedness of the agents in resorting to the obnoxious activity of electronic bugging, because in *Katz* it was mooted that apparently probable cause had existed for a possible search warrant, whereas in our case there is nothing in the record to indicate that the agents might have obtained a warrant on probable cause to bug Nebbia's hotel room.

It seems to us that weight should be given here to considerations along the above lines, i.e., the comparative gravity of the unconstitutional search facts in the particular case, because we are sure this Court, in deciding the present retroactivity issue, will want to consider factors of ultimate constitutional justice in the particular case, and not solely the formulary standards for administering the retroactivity problem. Surely such considerations of ultimate constitutional justice ought to weigh in that especially compelling sector of the retroactivity problem in which our case arises, the sector comprising cases still pending on direct review.

Continuing our analysis of the details of the *Linkletter* decision, we note next the Court's formulation there of its

basic standards for granting or not granting retroactivity. At p. 629 (381 U.S.) the Court said:

> "* * * [W]e must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. * * * "

Concerning the above standards of "prior history of the rule" and of "its purpose and effect", the Court in *Linkletter* concluded that, while the picture was a mixed one, the existence of the *Wolf** doctrine prior to *Mapp* was "an operative fact and may have consequences which cannot justly be ignored" (381 U.S. at p. 636), and this in turn led the Court to conclude that retroactive review of the many cases which might be affected by *Mapp* was unfeasible as a matter of judicial administration (*id.*, p. 637).

The Court also said that the "purpose" of *Mapp* was to deter lawless police action and that this purpose "will not at this late date be served by the wholesale release of the guilty victims" (*id.*, at p. 637).

In light of these statements in *Linkletter*, we would repeat our previous argument that, in the area of the law involved in our case, incomparably more than in the *Wolf-Mapp* situation, police had been under prolonged and ever-growing forewarning that the relevant activity (here electronic bugging done wholly outside Fourth Amendment standards) was of profoundly questionable constitutionality and would in all probability be outlawed, irrespective of considerations of "trespass". In no case decided on

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* *Wolf* v. *Colorado*, 338 U.S. 25.

the merits since *Goldman* v. *United States*, 316 U.S. 129, had this Court approved "non-trespassory" electronic room bugging, and powerful indications in the interim had proliferatingly been pointing to the outlawing of such activity.

Also, as the Government has conceded in this Court in the present case (Br. In Opp., p. 12), the effect upon the administration of justice of a retroactive application of the *Katz* principle "would not be of the same dimensions" as in the prior cases involving the retroactivity question. *A fortiori* this is probably true as to the category of *Katz*-type (or our type) of electronic bug cases which were still pending on direct review at the time *Katz* was decided. We do not have the statistics, but it scarcely seems likely that making the *Katz* principle applicable to cases of the latter category would impose an unfeasible burden on the administration of justice.

Indeed, this is a good place to point out that this problem of burdening the administration of justice is a problem which in its nature would never have anything more than minimal impact in regard to cases pending on direct review as distinct from cases finally decided. For, it would seem that many if not most cases pending on direct review would not even have to be sent back for burdensome further hearing as to the constitutional facts but could be disposed of in that regard by the reviewing tribunals before whom such cases are pending on direct review. Such is clearly true in our own case, for example; if *Katz* applies to us, the record in our case is such that no remand would be needed for further exploration of the constitutional facts, and the Government has in effect so conceded in this case as we noted earlier (Br. In. Opp. p. 9).

True, the problem persists as to the judicial and prosecutive burdensomeness of retrial of the indictment in cases of this type, but, again, such retrials are not to be expected to be numerous in the *Katz* area; in our case, for example, it is hard to see how the case could be retried without the Waldorf-Astoria bugging proof, which so indispensably pervades and supports this prosecution.*

As regards the police-deterrence factor mentioned in *Linkletter* (*supra*), consideration of this factor in the inquiry as to applying *Katz* to our case (a case still pending on direct review) is especially interesting. Electronic spying by Government against individual privacy is, as we above said, abhorrent, perhaps uniquely abhorrent in the Fourth Amendment area affecting "searches"; the only possibly competing Fourth Amendment abhorrence which comes to mind is of the sort which this Court said it felt in *Rochin* v. *California,* 342 U.S. 165 (stomach pumping to search for evidence). *Katz* ruled, in effect, that non-trespassory electronic snooping is constitutionally evil and abhorrent because it attacks the high constitutional value of individual privacy which *Katz* said the Fourth Amendment protects in such an encounter. Therefore, a high public good, high values of public morality, are served by deterring police from electronic spying against private individuals. The purpose of such deterrence would be distinctly, indeed notably, served by making *Katz* retroactive at least for cases which were still on direct review—or otherwise still in direct trial or other post-indictment litigation—at the time *Katz*

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* One reason why we devoted so much space to the description of the trial proofs in our Statement of the Case, *supra,* was to supply needed background for the line of argument here being presented on the retroactivity question.

was decided. There are several reasons why this is so. It is cynical to let policemen go on using a morally and legally questionable method of investigation down to the last possible moment until a court of final resort decides to stop them. Electronic snooping is *par excellence* the sort of police activity which should not be *retroactively condoned,* such condonation being the necessary consequence of a ruling that *Katz's* protection of individual privacy should be held prospective only; it is precisely this sort of retrospective condonation which *undeterred* police zealots are constantly counting on and piously go on rationalizing about in this branch of the law. When, as in the case of governmental police electronic spying that has been under such strong challenge in recent years, the police are *undeterredly* encouraged to continue the spying because they can expect to get away with it until a final judicial clamp-down hits them, the *Linkletter*-declared purpose of police deterrence is mocked.

It would be most salutary now, in this case, to let the police throughout this country know, that their cynical calculations have failed at least in regard to the non-trespassory electronic buggings presently still in direct prosecutive litigation, and that the police are not going to be indulged in salvaging the products of such unconstitutional malefactions which they deliberately continued down to the last possible moment. Unless such a ruling by way of deterring police is made in this case—which is the only case, apparently, presently before this Court on the merits presenting this problem in relation to the *Katz* ruling*—there is

* But perhaps cf. *Lee* v. *Florida,* No. 174 this Term, now pending decision after argument on the merits.

bound to occur, in all of the as yet unknown future possible situations of improvement of constitutional standards of fair criminal prosecution, a renewal of the cynical police calculational strategies, with accompanying further constitutional injustice to victims and, perhaps more important, further corrosion of governmental and public morality.

At the very least, in terms of the retroactivity problem, this Court should now explicitly notify policemen everywhere in this country that when, as in the present situation, substantial forewarning of constitutional disapproval has been conspicuously building up with respect to some particularly offensive police practice that has not yet been declared unconstitutional by a court of last resort, the police should be on stern warning that when and if the constitutional blow falls on them they are not going to be allowed to salvage the cases that are in the still pending direct litigational categories. We respectfully urge the Court to make an announcement along these lines as an explicit, systematic addition to the existing law of the retroactivity problem as presently found in the cases from *Linkletter* to *Stovall;* and we believe that this case of ours is an especially appropriate vehicle for that purpose.

Further favoring such announcement by this Court is the Court's recognition in *Stovall* (388 U.S. at p. 301) that one important factor in deciding how to handle retroactivity problems is "the possible effect upon the incentive of counsel to advance contentions requiring a change in the law" (citing scholarly commentators). How can counsel avoid "deterrence" of this very sort of "incentive" which the Court has praised and welcomed in *Stovall,* when counsel can never know whether, after the most ardent exertions

actuated by such "incentive", counsel may at the end find himself utterly thwarted only because he has "lost a race" with other counsel pursuing the same honorable objective of a constitutional improvement in the law; for, obviously, precisely such thwarting is what happens when a new overruling decision is finally achieved but is held applicable only to the parties in that particular case and not even to other parties in like cases still pending on direct review or other direct prosecutive proceedings. This thwarting of "incentive" would come about in an especially painful and unjust way in this present case of ours if *Katz* is not held applicable to our case. As earlier mentioned (and see Pet. Cert. pp. 13-18). We (counsel for the present petitioners) and our predecessor counsel in this case have been locked in intense combat with the Government since the Sring of 1966 concerning the issues of the Waldorf-Astoria bugging; that combat began nearly a year before the granting of certiorari in *Katz,* and it has continued unremittingly at every appropriate stage of the case both at trial and appeal (further details *infra*).

In the Brief In Opposition herein, p. 12, the Government has also urged—after conceding (*supra*) that making *Katz* retroactive would not involve administrative consequences "of the same dimensions" as in previous retroactivity cases —that this particular case should be salvaged for the police because it is a very big narcotics case. In other words, while the Government does not even claim here that there is more than a scattering of cases in which police would be disappointed if *Katz* is made (even fully) retroactive, the Government's theme is that its narcotics police should be allowed to retain the victory they have won in the present case because it is so big, important a case. Our reply is

that if the deciding consideration is the right of police to keep a major triumph of criminal conviction simply because it is a major one, then such reasoning would allow the police to keep any such major triumph no matter by what monstrous constitutional violations obtained; this argument of the Government is one of those arguments which proves too much.

Resuming our item-by-item analysis of the *Linkletter* reasoning, we next note that at 381 U.S. p. 635 the Court, referring to illegal search-obtained evidence, quoted from the *Mapp* case the phrase "the imperative of judicial integrity". Then, on page 639 (381 U.S.) the Court in *Linkletter* contrasted *Mapp* with cases where full retroactivity had been allowed, by saying that "the principles that we applied [in the latter cases] went to the fairness of the trial—the very integrity of the fact-finding process. Here, as we have pointed out, the fairness of the trial is not under attack. All that petitioner attacks is the admissibility of evidence, the reliability and irrelevancy of which is not questioned, and which may well have had no effect on the outcome". These last quoted words of the Court in *Linkletter* are of prime interest for our present argument on retroactivity.

In the first place, the words just quoted, taken as a general statement or suggestion that problems of unconstitutional search may not necessarily affect the "integrity of the fact finding process", are dissatisfying to one's visceral feeling of constitutional sensitivity; and in the earlier of the two *Linkletter* quotations just noted (from p. 635, of 381 U.S.), "the imperative of judicial integrity", the better view seems to be recognized that tainted search-obtained evidence does in truth affect such "integrity".

Second, it is hard to imagine a more striking contrast than that between the "search" facts of our case and the "search" facts referred to in the second of the above *Linkletter* quotations. In the latter *Linkletter* quotation the Court said that "the reliability and relevancy" of the search-obtained evidence was "not questioned". In our case the "reliability" of the Waldorf-Astoria electronic recordings is questioned by us, indeed we prodigiously question it; see our full discussion in Point III, *infra,* of the acoustical imperfections in the electronic tapes as played for the Jury in this trial, and the hopeless problems of probative fairness which were presented by the fact that the tapes recorded conversations in the French language which no member of the Jury could understand. We also question the "relevance" of the Waldorf tapes, because their acoustical unreliability has worked, likewise, confusion and ambiguity as to the relevance of their contents.

Our case contrasts fundamentally with *Linkletter* also in that, whereas *Linkletter* (as seen) says the search-obtained evidence "may well have had no effect on the outcome", in our case it is undisputed (as seen) that the Waldorf electronic proofs are deemed by the Government itself to have been indispensable and decisive in the conviction.

If our presentation in the last four paragraphs has the importance which we think it does, there would arise the following quite possibly decisive point in our favor on the within issue of the retroactivity of *Katz*:— Full retroactivity has been accorded to *Griffin* v. *Illinois,* 351 U.S. 12, by *Eskridge* v. *Washington Prison Board,* 357 U.S. 214; likewise to *Gideon* v. *Wainwright,* 372 U.S. 335, with which see *Doughty* v. *Maxwell,* 376 U.S. 202; and likewise to *Jackson*

v. *Denno*, 378 U.S. 368—all of which the Court in *Linkletter* characterized as being justifiable for full retroactivity because there was involved "the very integrity of the fact finding process" (381 U.S. at p. 639). It therefore appears that perhaps the single most important standard which this Court has announced as favoring full retroactivity is that of the "integrity of the fact finding process". On that basis alone, we are entitled to urge that our case should be given at least the limited retroactivity benefit which we are here requesting, that *Katz* be applied to our case because we are still pending on direct review; for, as just shown, our case involves in immediate and thoroughgoing ways the integrity of the fact finding process.

Again resuming our item-by-item analysis of the *Linkletter* decision, we note next that *Linkletter* emphasized the "delicate State-Federal relationship * * * as part and parcel of the purposes of *Mapp*" (381 U.S. at p. 637). Our case, being a Federal prosecution, relieves the Court of any such "delicate State-Federal" problems in arriving at a decision for or against retroactivity here. And, in fact, it is interesting that in all four of the Court's retroactivity decisions of the current period (*Linkletter, Tehan, Johnson and Stovall*) the convictions involved were in State, not Federal prosecutions. To be sure, we are aware that, at least in regard to the *Johnson* case (denying retroactivity as to the *Miranda-Escobedo* principles), the non-retroactivity doctrine has been affecting Federal as well as State prosecutions, in decisions of the Federal Courts which have been applying *Johnson*. But we think it may well be of *de novo* interest and importance for this Court to consider now, in ruling on the retroactivity questions in our case, that our case appears to be the first one that has

come before this Court on the merits for explicit consideration of the *purely Federal* aspects of Fourth Amendment retroactivity *versus* prospectivity; it certainly is the first case in which the Court is called upon to rule upon the merits of the retroactivity question for Federal prosecutions involving electronic eavesdropping of the non-trespassory type (*per Katz*). We therefore respectfully suggest that, in resolving the retroactivity question in this case, the Court is free to include, in its decisional components, consideration of the question of how the Court should here exercise its power to "supervise the administration of Federal criminal justice." And if the Court should find merit in this last suggestion, a ruling in favor of retroactivity (of *Katz*) in our case can be made on the basis of this principle of the supervision of the administration of Federal criminal justice, without more, and without getting into the complications of the "delicate State-Federal relationship".

Finally, in connection with *Linkletter's* allusion to inconvenience or hardship imposed by retroactivity rulings on judicial and prosecutive administration—and also as regards similar observations of the Court in the post-*Linkletter* cases (*Tehan, Johnson, Stovall*)—we submit that the concern of just constitutional policy in resolving these retroactivity problems should not be primarily with judicial or other governmental administrative convenience, or even with serious burdensomeness in performance of governmental tasks, but that the foremost concern should be with *rightness* of governmental conduct. For all of the reasons previously mentioned, the considerations just suggested have special persuasiveness in a case involving the despicable business of electronic snooping. It is unseemly as

a matter of constitutional values and public morality, to make the victim rather than the wrongdoer bear the disadvantageous impact of the choices which this Court may make as to prospectivity *versus* retroactivity in a case of the present type. What, after all, is the choice, in this latter regard, that a society professing democratic-humanistic values must weigh? Can such a society better afford the "burden", "stress", "inconvenience" of sacrificing its decency, than of sacrificing its "efficient" methods and standards of criminal prosecution? We are speaking here of nothing other than the age-old problem of "ends and means". Which puts more "pressure" or "stress" on a society's institutions, and on its spiritual and moral health thought to be served by those institutions—the need to keep people in jail and to avoid expenditure of the working time and the money needed to re-litigate such jailings when challenged on fundamental grounds of constitutional decency and public morality, or the need for the non-jailed multitudes of a "good" society to go on living each day, hour, minute and second, with the haunting knowledge that hundreds and thousands of social brothers remain in *durance vile* without hope of opportunity for just constitutional remission simply because the non-jailed group are told by (and complaisantly believe) their own highest Court that it is too inconvenient, too expensive in time and money, to sift the constitutionally defined justice of the claims of the prisoners? Which of these respective "stress" impacts more surely endangers the real *safety* of a decent society of men? If the three-thousand years teachings of Western man's most revered teachers and prophets of ethics and morality mean anything, the choice between the social-"stress" alternatives just formulated cannot be in doubt. The subtle but fatal disintegrative effect on human char-

acter and human spiritual health which inevitably must result from social acceptance of this kind of injustice against helpless individuals is incalculable. History should make us all fear such a disintegrative process like, literally, "the plague". And we respectfully urge this Court to consider whether, in its decisions from *Linkletter to Stovall*, it has satisfied its own cultivated sense of history and public morality.

The foregoing concludes our itemized discussion of the *Linkletter* facets affecting the retroactivity question in this case. The fullness of our *Linkletter* treatment, *supra*, plus the fact that this Court's subsequent three decisions on the same subject (retroactivity)—the *Tehan*, *Johnson* and *Stovall* decisions—largely adopted the *Linkletter* analysis, makes it possible for us to treat more briefly the post-*Linkletter* decisions.

The next decision after *Linkletter* was *Tehan* v. *Shott*, 382 U.S. 406, which involved the question of retroactive application, to a finally decided Ohio State prosecution, of the rule of *Griffin* v. *California*, 380 U.S. 609, that it is unconstitutional for a prosecutor or trial Judge to make adverse comment upon a defendant's failure to testify in a State criminal trial. *Tehan* ruled, or recognized, that the *Griffin* principle was applicable to cases still pending on direct review at the time *Griffin* was announced (382 U.S. at p. 409, fn. 3). But, as in *Mapp*, *Tehan* ruled that *Griffin* should not retroactively apply to cases in which direct trial and review proceedings had become final before the date of *Griffin*. The Court in *Tehan* emphasized (1) the State-Federal problem (which is not involved here); (2) the comparatively remote or imponderable impact, of comment concerning a defendant's failure to take the stand, on "in-

tegrity" of the judicial process for ascertainment of guilt or innocence—again, a factor as to which our case presents a substantial issue owing to the egregiously poor quality of the Waldorf-Astoria electronic tapes; and, (3) above all, the reliance on the pre-existing (pre-*Griffin*) rule in six States, as to which the Court said there would be, in the event of retroactivity, "an impact upon the administration of their criminal law so devastating as to need no elaboration" (382 U.S. at p. 419)—as above shown, nothing remotely approaching such prosecutive or judicial inconvenience is portended by the granting of a retroactivity ruling for our case.

And we note again that *Tehan* did preserve the benefit of retroactivity for cases still pending on direct review at the time of the *Griffin* decision—which is, frankly, all that we ask here for the sake of our clients, the present petitioners, whatever may be the chance of the Court's adopting a more extended ambit of retroactivity of *Katz* in this or other cases on the basis of the larger framework of policy and *pro bono publico*.

The next case after *Tehan* was *Johnson* v. *New Jersey*, 384 U.S. 719, involving the retroactivity question as to the *Miranda* and *Escobedo* decisions. Here again, in discussing *Johnson*, we may be brief in view of our extended discussion of *Linkletter*, *supra*. The petitioners in *Johnson* sought retroactive application of the *Escobedo* and *Miranda* principles after their cases had finally been decided in direct proceedings, and this Court declined their request. Aside from aspects of the *Johnson* decision previously noted herein, the points in that decision which need to be mentioned here are: *Johnson* preserved for possible retroactive protection, on a case-by-case basis, situations

which might arise involving issues as to the coercion or voluntariness of statements taken from accused persons by police questioners. Cf. *People* v. *Ballott*, 20 N.Y. 2d 600 (1967). We therefore now urge, in view of the intrinsically involuntary self-incriminating character of statements which police may secure through electronic snooping, that this "voluntariness" reservation in *Johnson* should be considered here as favoring retroactive application of *Katz* to our case. The Court's rejection of the "mere evidence" rule in *Warden, Maryland Penitentiary* v. *Hayden*, 387 U.S. 294, is not opposed to this latter suggestion of ours, because in the *Hayden* case itself the Court reserved for future consideration the Fourth Amendment issue as to items of a "testimonial" or "communicative" nature, or "items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure" in violation of the Fifth Amendment self-incrimination clause.* It is self evident that electronic eavesdropping yields precisely this kind of "testimonial" or "communicative" search-products. We therefore invoke the "voluntariness" reservation of *Johnson*, combined with the reservation just mentioned in *Hayden*, as further favoring a retroactive application of *Katz* to our case.

It should be remembered also that we are challenging the "reliability", that is the probative accuracy, of the Waldorf electronic tapes (*supra*). It is therefore pertinent to mention also that in *Johnson*, at 384 U.S. pp. 728-729, the Court noted the policy factors favoring retroactive effect for the *Jackson* v. *Denno* decision (*supra*) on the ground that "confessions are likely to be highly persuasive with a jury, and if coerced they may well be untrustworthy by

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* 387 U.S. at pp. 302-303.

their very nature". The same, or substantially similar, considerations apply to electronically recorded conversations claimed to be inculpative; such "are likely to be highly persuasive with a jury", and since they are obtained through "involuntary" (in effect "coerced") impositions upon the victim, their trustworthiness should be closely scrutinized, just as in the case of coerced "confessions". The interplay between the Fourth and Fifth Amendments hardly needs to be recalled in this connection, see, e.g., *Boyd* v. *United States*, 116 U.S. 618; and Mr. Justice Brennan's dissent in *Lopez* v. *United States*, 373 U.S. 427, collecting the authorities. This facet of the *Johnson* decision, then—reserving the "voluntariness" issue for retroactive exploration and vindication, further supports our request for retroactive application of *Katz* to this case.

Johnson gives pro-retroactivity weight also to the factor of "the persistence of abusive practices", in response to which, *Johnson* states, the test of judicial scrutiny "has become increasingly meticulous through the years" (384 U.S. at p. 730). Like considerations apply in this case of persistently abusive practices of electronic snooping.

Johnson also, at 384 U.S. p. 731, refers to the factor, in considering whether or not to allow retroactivity, of "the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed". This factor favoring retroactivity is applicable to the present case to a striking degree, as earlier demonstrated.

Finally, *Stovall* v. *Denno*, 388 U.S. 293, involving the question of retroactivity of the "line-up" and identification decisions, carried (as we earlier remarked) the Austinian prospectivity principles to the utmost degree short of deny-

ing relief to the prevailing parties in the overruling case itself. The proceeding in *Stovall* was one post-dating final decision in the direct prosecutive and review proceedings. The holding in *Stovall* is therefore not opposed to our request for retroactive application of Katz to this case as being a case still pending on direct review proceedings.

However, *Stovall* did go out of its way to preclude such retroactive application to pending cases. As regards this "*dictum*" pronouncement in *Stovall*, we would respectfully urge that a like ruling in our case would be shocking to law and justice for all of the reasons previously herein set forth. Besides, we take it that, speaking qualitatively as it were, the *Stovall* "*dictum*" as to cases still pending may not necessarily commend itself to this Court's mind when comparison is had as between the line-up-identification problems dealt with in *Stovall* on one hand, and the electronic spying problems involved in our case.

But if the *Stovall* "*dictum*" above mentioned was meant by the Court to portend a general principle of decision denying retroactivity even for cases still pending on direct review, we must then renew, with all respectful earnestness, our suggestion (*supra*) that, in the relatively short time starting with the decision in *Linkletter*, the Court has advanced with perhaps too rapid a pace in moving towards a position of almost puristic Austinian "prospectivity", and that we believe we are correct in our critique *supra* of the Court's historical discussion of the Austinian theory in *Linkletter* (which was again referred to inferentially in *Stovall*—388 U.S. at p. 301) and in our various contentions *supra* which we believe favor applying *Katz* to this case as one still pending on direct review. We urge that

the *Stovall "dictum"* cannot be applied here, for all of those reasons.

We note also that the *Stovall* holding as such—aside from the *"dictum"* as to cases still pending on direct review—has recently been the subject of flexible re-interpretation (in favor of convicted persons) in *Pearson* v. *United States,* 5th Cir., January 12, 1968, 2 Criminal Law Reporter 2437; and in *Thompson* v. *State,* Okla. Ct. Crim. App., decided February 21, 1968, *ibid.*

C. Additional Considerations Favoring A Ruling In This Case That The *Katz* Principle Is Applicable If Only Because This Case Is Still Pending On Direct Review.

Under this sub-heading we collect for the Court's consideration a miscellany of items which may assist in arriving at a correct decision of the retroactivity issue.

1. It was noted in *Berger* v. *New York,* 388 U.S. 41, at pp. 47-48, fn. 4, that eight States, including New York, prohibit surreptitious eavesdropping by mechanical or electronic device, and that of those eight States all except Illinois permit official court-ordered eavesdropping of this type. See also *Elson* v. *Bowen,* S. Ct. Nev., December 20, 1967, *2 Criminal Law Reporter 2265,* compelling a defendant FBI agent to testify in a civil action as to allegedly illegal electronic surveillance of a conversation in a Los Vegas hotel, involving the prohibitory legislation of Nevada, which is one of the eight States referred to in *Berger.* New York State's legislation which prohibits such bugging is *N.Y. Penal Law* §738. That provision was on New York's statute books long before the Waldorf-Astoria bugging in our case, which took place in December 1965. Denial of retroactive application of Katz in this case would neces-

sarily have the effect, in so many words, of condoning a defiance of the New York anti-bugging legislation. To our knowledge, no previous case of the "retroactivity" series of cases in this Court commencing with *Linkletter,* or any other decision of this Court or of any other Federal Court, has ever involved or contemplated such an offensive decisional result. It is undisputed that the agents in our case did not have a New York State judicial permissive order. While this issue has not been decisively operative in the litigation of the present case thus far, it would become an issue of immediate urgency on both constitutional and other policy levels if, now, notwithstanding *Katz,* this Court were to rule in our case that the Waldorf bugging was legal. The inevitable result of such a ruling would be to set at naught, through the paradox of denying Katz retroactivity and at the same time *retroactively* trampling down the New York legislation, New York State's own carefully planned system for preventing this very sort of electronic bugging without advance judicial permission. We may mention in this connection that, as we understand *Berger* v. *New York, supra,* this Court did not invalidate New York's *prohibitory* legislation in this area, but only its *ex parte* permissive court-order legislation.

2. The *Katz* case, in examining various constitutional foundations of the right of individual privacy which is protected against Fourth Amendment improprieties (see fn. 5 in *Katz*), apparently did not make mention of the Ninth Amendment of the Constitution. We have invoked the Ninth Amendment herein (Pet. Cert. p. 9). We respectfully suggest, therefore, that it is open to us to urge that *Katz* did not exhaust the entire roster of constitutional issues pertaining to allegedly non-trespassory electronic

room-bugging as raised by us herein, and that accordingly this case may be decided by this Court in our favor on an additional or independent point of constitutionality not governed by *Katz*; whereupon the conclusion could follow that our case does not indispensably depend, in any event, on a "retroactive" application of *Katz*.

3. In two recent decisions the Seventh Circuit has dealt with electronic eavesdrop situations in a manner plainly connoting that that Court deems *Katz* to be retroactively applicable in the fullest sense. *United States* v. *Hagarty*, C.A. 7, decided January 11, 1968 (opinion by Cummings, J.), 2 *Criminal Law Reporter* 2360; *United States* v. *White*, C.A. 7, decided March 18, 1968 (opinion by Schnackenberg, J.), 3 *Criminal Law Reporter* 2005.*

4. See also the annotation in 10 A.L.R.3d 1371 ("Prospective Or Retroactive Operation Of Overruling Decision").

5. We call attention to the language of the *Katz* decision itself where the Court rejected the Government's argument that because its agents relied on *Olmstead* v. *United States*, 277 U.S. 438 and *Goldman* v. *United States*, 316 U.S. 129, the Court should retroactively validate their conduct, an argument to which the Court's succinct reply was, "That we cannot do. * * * [T]he inescapable fact is that" the agents had chosen to decide for themselves, rather

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* Cf. also *Dryden* v. *United States*, C.A. 5, decided March 22, 1968, 3 *Criminal Law Reporter* 2028, holding *Katz* inapplicable to telephone-extension eavesdropping (with informer's consent) but making no mention of any supposed difficulty of retroactive applicability of *Katz*. To similar effect is *Clark* v. *State*, Md. Ct. Spec. App., decided January 29, 1968, 2 *Criminal Law Reporter* 2404. *Query*, whether *Lee* v. *Florida*, No. 174 this Term in this Court, will affect the substantive rulings of the latter two telephone cases in relation to *Rathbun* v. *United States*, 355 U.S. 107.

than presenting to "a neutral magistrate", the agents' claimed belief that they had probable cause to conduct their electronic activity.

6. This case was originally set down for argument immediately following argument in *Lee* v. *Florida*, No. 174. The electronic eavesdrop issues in the two cases are not the same, since *Lee* involves the party-line type of telephone wiretapping, done by State police officers in investigating violation of state law, and our case (like *Katz*) involves allegedly "non-tresspassory" room bugging by Federal police investigating a Federal crime. However, the decision of both *Lee* and our case seemingly would be affected by the newly announced plenary Fourth Amendment principle of *Katz*, unless *Katz* is held inapplicable on grounds of non-retroactivity. The *Lee* monitoring took place (or commenced) in July 1963 (*Lee* v. *Florida*, No. 174 this Term, Petitioner's Appendix, pp. 12, 36); the Waldorf-Astoria bugging in our case was in December 1965. Although *Lee* presents the broad *Katz* Fourth Amendment issue in a factual setting of state action and telephone wiretapping, these very circumstances may well result in a renewed plenary formulation of the *Katz* Fourth Amendment principle when this Court hands down its decision in *Lee*. Should that happen, and had our case been argued with *Lee* as originally planned (so that the decision in our case could have been rendered not later than the decision in *Lee*), our petitioners may have become entitled to "non-retroactive" benefit from such a *Lee* decision. We intend no presumptousness by broaching these speculations in a matter which lies so peculiarly within this Court's *in camera* province, but we are trying to discharge as fully as possible our responsibility as counsel to present in this brief a comprehensive treatment

on the important and as yet undecided issue of retroactivity *versus* prospectivity in applying decisions like *Katz* to other cases of electronic monitoring.

7. On April 22, 1968, the Court granted certiorari in *Kaiser* v. *New York*, No. 1451 Misc., presenting the issue of retroactivity of *Berger* v. *New York*, 388 U.S. 41.

POINT II

A. Even if *Katz* v. *United States*, No. 35 this Term, is held inapplicable to this case on grounds of non-retroactivity, the Waldorf-Astoria electronic proofs have fatally tainted the case because, under pre-*Katz* standards, that electronic bugging was unconstitutional.

B. In any event, if the Waldorf bugging should be deemed on the present record not to exhibit violation of pre-*Katz* standards as petitioners contend, there is more than enough indication in the present record as to the dubiousness of the findings of the courts below which validated the Waldorf bugging as complying with pre-*Katz* standards, to require at the least a remand by this Court for a *de novo* and plenary hearing as to that bugging.

C. In any event also, it was error for the Court of Appeals to refuse to include, in its order for a remand hearing as to electronic eavesdropping, the subject matter of the Waldorf bugging, in view of the overall circumstances of the case which included belated disclosure by the Government of trespassory electronic surveillance in addition to the Waldorf incident, strong indications of untruthful testimony by narcotics agents in the pretrial Waldorf-bugging hearing, and other circumstances denoting obstructive or evasive conduct by the Government's representatives.

The Waldorf Astoria Eavesdropping; the Pretrial Hearing

At a pretrial session on April 27, 1966 the Government advised that there had been electronic eavesdropping in this case—later identified as the Waldorf-Astoria incident (R. 3151 *et seq.*). This was the Government's first revelation of its electronic activities in this case. Upon inquiry by defense counsel the Government assured that the only eavesdropping of which it knew was in New York City, "there was none in Georgia, for example, there was none in Florida", there was none "outside of the country"; and Government counsel further assured that he had examined the Narcotics Agents' reports before making these representations; indeed Government counsel during the pretrial colloquy here being described again checked privately, but in open Court, with the supervising Narcotics Agent, Fitzgerald, and then renewed the representation (R. 3157-3161). The representation was renewed, under intensive colloquy-inquiry by the defense at another pretrial session about a month and a half later (Tr. June 8, 1966, pp. 259-260).

A pretrial hearing was held concerning the Government's revelations of having bugged Nebbia's room at the Waldorf. We contend that on the basis of that pretrial record, without more, the conclusion is required that the bugging of Nebbia's room was done in a manner which brings it within the ban of the pre-*Katz* cases against "trespassory" electronic eavesdropping. *Silverman* v. *United States*, 365 U.S. 505; *Clinton* v. *Virginia*, 377 U.S. 178.

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At a later page we shall describe in detail, with citations to the record, the testimony and other proceedings at the pretrial hearing concerning the Waldorf-Astoria room-

bugging, but first we present the following introductory description and comment*:—

The electronic installation at the Waldorf-Astoria Hotel which the Government states was used in this case** was the attaching, by adhesive tape, of what is known as a multi-directional microphone to the bottom of the door in the agents' hotel room (Room 1600), there being a small aperture at the bottom of the door (about 3/8"), and the microphone being tilted at an angle of forty-five degrees, i.e., tilted back in the direction of the agents' room in such a manner as to form a cup that would act as a collector of sound coming from underneath the door (see the photographic exhibits, Govt. Ex's 1, 2, 3, 4, in ev. at Tr. of June 7-8, 1966, p. 105). A wire ran from this microphone to a bathroom in the agents' room where the wire connected to what is known as a pre-amplifying device which in turn was connected to a tape recorder that also had an auditing device by which the agents could listen at the same time that the sound was being recorded on the tape.

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* Our observations of a technological character in the following pages are based on Appendix B hereto, *infra*, an affidavit by the nationally noted electronic-voice-recording expert, Bernard B. Spindel. That affidavit was filed in the Court below shortly preceding the oral argument of the appeals from the convictions. As more fully indicated *infra*, important developments affecting the electronic eavesdrop issue in this case occurred during the pendency of the appeals. One of these developments was the then newly-emerged (November-December 1966) "*Schipani*-review" program, which we invoked in the Court of Appeals as requiring *de novo* exploration of both the Waldorf bug and any other electronic surveillance relating to this case. In our following presentation we try to keep a clear dividing line between record items preceding the appeals and those which originated in the record during the appeals.

** *Infra* we note the facts which cast doubt on the truthfulness of the agents' description of how the Waldorf bugging was done.

It is important to note that the door in the agents' room to which the microphone was allegedly taped was *part, and part only,* of the separation between the two rooms. There was also, separated by a narrow space of only a very few inches from that door in the agents' room, a similar or identical door leading into Nebbia's room. In other words, the two rooms were separated by a double door with a narrow air space between them, a double door construction of the familiar type found in many hostelries of the better class. This, in turn, means that between these two immediately adjoining doors the narrow air space which existed was *common* to each room and formed, so to say, a common *cushion* of an acoustic nature; and at the same time, and more significantly for present purposes, it formed, *when (but only when) electronically bugged from either room in the manner claimed by the Government itself, a common sound chamber.*

The particular method of multi-directional microphone electronic bugging which the Government itself asserts was used in relation to the double-door-air-space situation of the two adjoining rooms in question, amounted (on the Government's own factual representations, we repeat) to what electronic sound technicians commonly denominate as (using their various terminological synonyms)* a form of *"intrusive"* electronic bugging employing the principle of the "tuned chamber", or "resonator tube", or "resonator chamber", or "tuned resonator", or "frequency cavity chamber" or—turning now to terminologies which may be more familiar in the contemporary lay vocabulary during the current era of heightened interest in electronic bugging—the principle of the "tubular microphone", or

* See Appendix B hereto, *infra.*

"pipe microphone", or "shotgun microphone" or, what is probably the contemporaneously most familiar (and frightening) term of all of these, the principle of the "parabolic mike". That is to say, when a multi-directional microphone is taped to an aperture of a narrow airspace of the type here involved (the double door setup between the agents' and Nebbia's room) in the manner here done and at the angle of tilt here used, that microphone operating in combination with the narrow intervening airspace becomes a "parabolic mike" for the purpose of electronically bugging the adjoining room space, *viz.*, Nebbia's Room at the Waldorf-Astoria.*

All of our foregoing recitals, and remarks, concerning what we have termed the "parabolic mike" character of the installation at the Waldorf-Astoria, are based, we respectfully repeat, on the Government's own description of the physical facts of the installation. The decisive physical feature in this picture is the *double-door with narrow intervening airspace.* The supposedly identical or dispositively similar microphone installations in the hotel or motel rooms involved in *United States* v. *Pardo-Bolland,* 348 F. 2d 316 (C.A. 2, 1965), cert. denied 382 U.S. 944, did not involve *double doors (infra).*

The classic pre-*Katz* expression by this Court in defense of room-privacy against electronic-eavesdrop intrusion where the latter is sought to be constitutionally condoned as being technically "non-trespassory"; was made in *Silverman* v. *United States,* 365 U. S. 505, where the electronic buggers utilized, with what proved to be a constitutionally abortive intention of "non-trespassory" finesse, a mini-

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* See the last preceding footnote.

mally intrusive device for picking up what amounted to sound-chamber products in a heating duct system of the premises there involved. In the particular kind of double-door-with-narrow-intervening-airspace that is involved in our case, the airspace or sound-chamber is the equivalent, we suggest, both under the laws of physics and under the law of the United States Constitution (Fourth and Fifth Amendments), to the sound chamber which in *Silverman* consisted of the heating duct system.*

In short, the airspace between the double doors in our case had a necessary effect if not an express engineering purpose of creating an acoustical barrier or air cushion for the benefit of additional privacy for the Waldorf-Astoria's guests—so that such air space may properly be deemed to be part of the premises of Nebbia's room, and the Government's utilization of this air space in the particular bugging installation here claimed by the Government to have been used became in literal effect a perversion of the special privacy barrier, forming part of Nebbia's premises, into a means for directly invading his privacy.**

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* The case law of the pre-*Katz* standards is more fully discussed *infra*.

** We are aware that similar reasoning as to privacy—invasion of a room-partition—could be urged in a case like *Pardo-Bolland, supra,* where a single door was used on the agents' side, or in a case like *Goldman* v. *United States,* 316 U. S. 129, where a "detectaphone" was placed against a common wall, said installations having been judicially approved (condoned might perhaps be the better word)—again, this was during the pre-*Katz* period. However, as developed in the text following this footnote, we are not aware that any argument was advanced in either of the latter pre-*Katz* cases along the lines here being suggested, namely, that where an apparently expressly designed acoustical barrier for *enhancement* of *single-door* or other *single-partition* privacy has been provided the deliberate perversion of such privacy barrier into an anti-privacy device presents a pre-*Katz* Fourth Amendment issue. As a matter of fact, this form of instrusion into an

We have examined the record and briefs in the Court of Appeals in *Pardo-Bolland, supra,* and the certiorari papers in that case, and it does not appear that any argument or analysis along the lines here being suggested was advanced. In the petition for certiorari in *Pardo-Bolland* (p. 6), it was merely stated, conclusorily and without demonstration, that the microphone taped to the agents' side of the door between the two rooms was "an unauthorized physical penetration into the premises occupied by" Mr. Pardo-Bolland, within the meaning of the *Silverman* case; and it was suggested that an engineer with calipers or a micrometer might be needed to determine the depth or degree of penetration, "fractions of inches" being urged as having no significance in view of the *Silverman* case. Our position here does not depend upon demonstrating any "physical penetration" in the conventional sense,* as was futilely attempted to be shown in *Pardo-Bolland;* our position depends rather upon a specific analysis of the electronic and acoustical circumstances which we say here point to an unauthorized invasion of an integral part of Nebbia's private "close", namely, his acoustical privacy-barrier provided by the double door arrangement with air-space in between.

One factual feature which is common to *Pardo-Bolland* and to our case is that in both cases the hotel management secretly cooperated with the Government agents to enable

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acoustical air space barrier actually makes for a pronouncedly more efficient electronic eavesdrop, with the type of device that the Government says it here used, than is true in cases like *Pardo-Bolland* and *Goldman* where only a single door or single wall partition is involved. See Appendix B to this brief, *infra,* the affidavit of our electronic consultant, Bernard B. Spindel.

* The *Katz* problem of "physical penetration", or of "trespass", is further noted under the concluding subheading of this Point II, p. 118, *infra.*

the latter to breach the privacy of the respective hotel guests' rooms. However, the record, briefs and certiorari papers in *Pardo-Bolland* do not indicate that this circumstance was raised or that it entered into the consideration or decision of the case. See our description *infra* of the pertinent record items herein which bear upon the actions of the Waldorf-Astoria Hotel management in cooperating secretly with the agents for the purpose of depriving Nebbia of the privacy of his hotel room. If the Fourth Amendment, as we take it is unquestionable, expressed already pre-*Katz* a historical-social policy in favor of certain minimum civilized standards of decency in regard to attempted invasions of the constitutionally protected right of individual privacy, this sort of stealthy and conspiratorial plotting between secret police investigators and a man's trusted hotel host, surely calls for Fourth Amendment scrutiny on pre-*Katz* standards. Cf. Mr. Chief Justice Warren's concurring opinion in *Lopez* v. *United States,* 373 U. S. 427, 444, where similar instances of breach of trust or confidence are referred to in disapproving terms; and cf. also the statement of the Government's counsel in the oral argument of *Hoffa* v. *United States,* 385 U. S. 293, that while the Government conceded "no difference under the Fourth Amendment" as regards the question of closeness or trust in confiding one's secrets to another person, "perhaps there is a due process difference. There is a point—and [Chief Justice Warren's] concurring opinion in *Lopez* suggests—where closeness will affect due process." 35 U.S. Law Week 3136. This Court's decision in *Hoffa* specifically notes that "it is obvious that petitioner was not relying on the security of his hotel suite when he made the incriminating statements to Partin [Hoffa's supposed close friend and associate] or in Partin's

presence. Partin did not enter the suite by force or by stealth. *He was not a surreptitious eavesdropper.* * * * The petitioner, in a word, was not relying on the security of the hotel, he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing. * * *". (Emphasis added) The contrasting facts of the surreptitious electronic snooping in our case need not be elaborated.

Let us now examine more closely some of the pertinent details of the Waldorf-Astoria eavesdrop.*

First, as to the sheer question of whether the agents told the truth at all about the physical facts of their Waldorf bug installation:—In the pretrial hearing Narcotics Agent Durham described the Waldorf eavesdrop equipment as consisting of "a dynamic microphone made by Shure Brothers, known as a Model MC-11-J. It has an impedance of approximately 1700 ohms, and is matched precisely with this Concord Model No. 330 tape recorder and an amplifier that I personally had assembled here." (Tr. May 4, 1966, pp. 5-6). Durham also explained that the amplifier would act as a pre-amplified to boost the power of the tape recorder when the eavesdropped sound signal dropped to a volume level too low to record normally on the tape recorder (*id.*, p. 6); that the Concord tape recorder operated either from its own battery pack *or from room current*** (*ibid*); and,

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* References *infra* to Appendix B of this brief may be of special interest to the Court because said item is the previously mentioned detailed technological affidavit by Bernard B. Spindel, generally acknowledged to be the leading expert in this country on electronic eavesdropping techniques.

** See our Question Presented, No. 3, subd. (c), *supra*. Both Durham and Agent Kiere later testified that the apparatus had been operated on the hotel current (Tr. of May 4, 1966, pp. 9-10; June 7-8, 1966, p. 108). We return to this topic *infra*.

referring to the manner in which the microphone was placed and taped at the bottom of the door, that "By using this tape thusly (indicating) it becomes somewhat a collector of sound, directing the sound into the microphone itself" (*id.*, p. 7).

See our motion in the Court of Appeals filed January 4, 1967, where it is shown in the affidavit of Bernard B. Spindel (Apendix B hereto, *infra*) that the Shure Brothers microphone model MC 11 J which Agent Durham says was used is á *low* impedance microphone of only 1000 ohms, not the 1700 ohms stated by Agent Durham which would be a "high impedance" unit; that these facts are objectively demonstrable from standard catalogue materials; that the MC 11 J microphone would absolutely not have "matched precisely with this Concord model no. 330 tape recorder" which Durham said he used; that the pre-amplifier mentioned by Agent Durham would have been absolutely indispensable on the basis of *constant* operation to get any results at all, which in turn leads to the difficulty that the agents' testimony is that the pre-amplifier was not used constantly; that it is difficult if not impossible for the installation described by Durham to have worked, *pointing to the strongest likelihood that a quite different installation was used, of a type which almost surely would have entailed a physical intrusion or "trespass" into Nebbia's room*; that in any event a multi-directional microphone thus placed and taped to focus upon sound received through the air space between the two doors becomes a "parabolic mike"; that despite the taping (and despite muffling by a cloth towel also mentioned by Durham —Tr. of May 4, 1966, p. 8) the type of microphone here assertedly used would inevitably also pick up sound in the agents' room. We indicate, *infra* the extremely interesting

significance of this latter problem of the picking up of sound in the agents' room.

Further, Agent Kiere, who had operated the Waldorf-Astoria eavesdrop machinery, said that it was necessary to regulate the volume of the pre-amplifier in the bathroom, saying, "This was rather critical because of the closeness of the microphone and occasionally there would be a feedback effect with a high piercing screech, where I would have to lower the volume" (*id.*, p. 10). Agent Durham said he had instructed Kiere to use the pre-amplifier only when necessary to improve audibility, "so that you don't overload the entire circuit" (*id.*, p. 16). Durham also said that there was a voice actuated function in the equipment which would actuate the tape recorder at times when such might not be desired (*id.*, p. 20).

The items mentioned in the above three paragraphs give rise to additional problems which we pointed out to the Court of Appeals (Appendix B, *infra*, affidavit of Mr. Spindel): Was the use of the common hotel current in the nature of an invasion of a "common appurtenance" for the purpose of electronic spying on Nebbia, and is such constitutional? Could the equipment work at all when the pre-amplifier was not turned on? Did the feedback screech, which would presumably issue from the microphone, constitute an invasion of the air space between the two rooms or of the air space in Nebbia's own room such as might incur the pre-*Katz* constitutional ban against a physically instrusive factor occurring in the course of the electronic eavesdropping? Did the existence of the voice-actuated function necessarily subject the tape recorder to reception of far more sound from the Agents' own room than the

tapes actually reveal, and, if so was the microphone actually in the Agents' room at all, or must it have been inside Nebbia's room? These and other disturbing matters (*infra*) casting doubt on the Government's representations about the Waldorf bug were unavailingly urged before the Court of Appeals as at least justifying a remand for a further hearing on the Waldorf activity.

The items next to be mentioned are especially distressing in their indications that not all of the Government's witnesses have thus far told the truth about the Waldorf bug installation.

Agent Durham testified (pretrial hearing of June 7-8, 1966) that Agent Kiere told him that the door to which Durham later attached the microphone was a *connecting door* to the next room; Durham said he assumed that this door *opened into Nebbia's room* because of what Kiere had told him (Tr. June 7-8, 1966, pp. 98-99). Despite this testimony of Durham that he assumed from what Kiere had told him that the door on which he attached the microphone opened into Nebbia's room, he later also said, "It was my understanding there were two doors"; he was then asked who informed him of this, and he replied (note the guarded resort to "best recollection"), "Again, to the best of my recollection, I believe Agent Kiere" (*id.*, 108-109). This theme was further pursued (*id.*, 109-112):

> "Q. Agent Durham, this door under which you placed the microphone, did you know if there was another door similar to that on the other side opening to 1602? A. Not from personal knowledge, no, sir.
>
> Q. Who told you that? A. I believe Agent Kiere.

Q. Did he say that he had opened the door from 1600 to examine the other door? A. He did not.

Q. Do you know if he did? A. I did not know that, no, sir.

Q. Did you see any plans to know how far apart the two doors were? A. No, sir."

• • •

"Q. Now, did you look through the air space? Did you look through that space? A. No, sir, I did not.

Q. Did you examine that space at all? A. No, sir.

Q. Did you check to see if that air space was clear to the next room? A. No, sir, I did not.

Q. Did anybody tell you whether or not that air space was clear to the next room? A. No, sir, they did not.

Q. In other words, there could have been a solid wall on the other side of that with no air space, as far as you knew, is that correct? A. Judging by the performance of the equipment I used it would be my opinion that there was not a wall.

Q. In other words, you only checked it by testing the equipment, is that correct? A. That's correct, sir."

Most interesting, in view of Durham's thus having tried to shield from discovery that any agents had opened the door on the agents' side which led to the door to Nebbia's room, is the fact that all or nearly all of the agents who testified at the hearing, except the very guarded Mr. Durham, freely admitted that they had opened the door on the agents' side of the double door arrangement. Kiere so admitted (*id.* 131). Likewise Agent Klempner, who indeed stated that the door was opened in the presence of a representative of the hotel management (*id.* 240-241). Agent Walter J. Smith said that he opened the agents' door and

observed that there was no handle on the door leading directly into Nebbia's room (*id.*, 203); Smith said also that other agents had opened the door, including *Durham himself*, Kiere, Weinberg and Klempner (*id.* 217-219); Smith said he put his ear to the inner door (Nebbia's door) but could not hear anything (*id.* 204-205, 209-210).

Thus, Smith's testimony contradicts that of Durham, the installation expert who swore he had not opened and had not been present at any opening of the door and had no idea as to the physical construction of the arrangement or the air space in between.

It taxes credulity that Durham, supposedly an experienced electronics surveillance agent, would make this important installation with the naive lack of knowledge of the physical facts as claimed by him at this hearing.* The logical inference is that, if Agent Durham was evidently so bent upon concealing the technical details of what he had done, he may well have been trying to hide something which should not legally have been done. It is very difficult to avoid the conclusion that Agent Durham has not told the entire truth, and that a grave question persists as to just what in truth was the nature of the electronic installation. *Cf.* the intriguing testimony of former Agent Weinberg, who swore that he had seen no electronic apparatus in the agents' room at all (*id.*, 263, 265-267).**

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* See the Spindel affidavit (p.A10) in our Appendix B, *infra*, stating: "As an expert in this field * * * it is incredible to me that any other qualified expert in the field would go about making an installation of this type on the basis of the lack of knowledge of the physical set up as stated by Agent Durham."

** Might this be because the equipment was *elsewhere;* and because its linkage was with a "trespassory" installation inside or penetrating Nebbia's room?

We previously referred to the absence from the tapes of certain kinds of extraneous noises which should have been audible on the tapes if the agents were telling the truth about the method of electronic installation by which the tapes were obtained. As seen, the agents' testimony was that the microphone used was of the multi-directional type, and that the installation was equipped with a voice-actuated function which would cause the equipment to go into recording operation when a certain minimum volume of sound occurred. In other words, this was a microphone which would just as (or more) sensitively pick up sounds in the agents' own room (where indeed the sources of sound were nearer and more open to the microphone) as in Nebbia's room; and with the voice actuated function being installed in this apparatus, there should have been heard on the tapes a substantial amount of sound coming from the agents' own room; indeed, there should have been numerous really prominent passages of sound coming from the agents' room, because there was quite a bit of sound-producing activity going on in that room, including extensive use of a typewriter by Kiere (R. 685, 855-860), a very actively used portable shortwave radio for constant communication with surveillance agents (R. 970-976—the "whole room could hear it" (R. 976)), the ringing and dialing of telephones and voices speaking on the telephone (R. 495-595), the playing of already recorded tapes (R. 693, 702-704) and, presumably, the various conversations among the agents in the room. Yet, by some apparently inexplicable magic this sensitive multi-directional microphone seems to have missed picking up any perceptible amount of all of the above enumerated categories of notable intra-room noise in the agents' own room. Nor can the explanation lie in the fact

that one of the tapes had been processed for elimination of background noise, because, we may inform this Court, the unprocessed tapes sounded, if anything, freer of any such extraneous noise than the processed tape.

Of course, there is one completely logical explanation of how it could have happened that this highly sensitive multi-directional microphone failed to hear practically any of the numerous and strikingly obtrusive noises that it should have heard in the agents' room, and this explanation would be that the microphone was not in the agents' room, but was in Nebbia's room. The Government has never given a satisfactory explanation of the puzzle as to why the Narcotics Bureau's microphone was so prejudiced against listening to typewriters, blaring radios, clanging telephone bells, etc., in the agents' room and was so much more receptive to listening to voices in Nebbia's room.*

As to the conduct of the hotel management in betraying Nebbia's privacy, Agent Kiere testified that Mr. Whiteman, of the Waldorf-Astoria staff, had told him that Room 1602 was the room which was to be "electronically surveyed" (*id.*, 124). Agent Shrier said he had no knowledge of anyone in the Narcotics Bureau asking the Waldorf-Astoria to assign Nebbia to a particular room (*id.*, 253). But the district court prevented defense counsel from questioning other agents about this (Tr. June 7-8, 1966, pp. 128-129, 135-136, 215-217). Mr. Whiteman testified that the agents had requested a room as close as possible to Nebbia's room (*id.*, 151-152); he did not know whether any other hotel personnel

* We are aware that Agent Kiere drew attention to one or two instances of telephone noise or human voices which he thought might have come from the agents' room, but these instances are *de minimis* in relation to the size of the problem which we think the Government faces in answering the above question.

had additional information about the circumstances of the renting of the two rooms involved (*id.*, 152); he did not have the hotel records pertaining to the renting of Nebbia's room, stating that the Government had taken those records (*id.*, 142); other records, which might have thrown light on the circumstances, had been destroyed (*id.*, 155-156).

At the conclusion of the Waldorf-Astoria eavesdrop pretrial hearing the Trial Judge denied the defense motion to suppress on the ground that no trespass or other illegality had been shown (Transcript of June 7-8, 1966, pp. 270-275); all of the defendants had joined in the motion to suppress (*id.*, 275).

At the trial the Waldorf Astoria eavesdrop evidence was introduced over defense objections, as previously noted.

As mentioned in the footnote on page 91, *supra*, there were new developments after the appeals were taken from the convictions herein (the defendants were sentenced August 30, 1966 (18a-19a) and the appeals were argued January 19, 1967). Those new developments were (1) that in November-December 1966 the "Schipani" electronic-eavesdrop administrative review procedure was announced by the Department of Justice, and (2) that in counsels' relatively more leisurely re-study of the trial record in preparation for the appeals we obtained what seemed to us important new insights into the circumstances of the Waldorf bugging as revealed in the transcript of the pretrial hearing above discussed. Accordingly, we included in the appeal briefs, and we urged in the argument of the appeals, all of the above noted matters pointing to the suspiciousness of the agents' claims of how the Waldorf

bugging was done, and we asked the Court of Appeals also to assist in a "Schipani"-type re-exploration of the Waldorf bugging notwithstanding that there had already been a pretrial hearing on that subject and that the bugging had been approved as constitutional. In these requests to the Court of Appeals we specifically raised the points noted *supra* as to the "parabolic mike" character of the Waldorf bugging as rendering that activity unconstitutional under then-applicable (pre-*Katz*) standards, and we emphasized the suspicious conduct of the agents as a significant factor favoring "Schipani" re-examination. Indeed we believe it is correct to say that the substance of the entirety of our presentation in the preceding pages of this Point II was before the Court of Appeals at the time of the oral argument on January 19, 1967, *via* the appellants' printed briefs plus extensive written motion papers (See the "Motion for Permission for Electronic Consultant to Listen to And to Inspect Tape Recordings" filed by appellants in the Court of Appeals January 4, 1967; and the "Motion for Supervisory Orders re Electronic Eavesdropping Issues etc." filed by appellants in the Court of Appeals on or about January 11, 1967; and see the listing of twenty-seven roman-numbered items in the joint petition for certiorari herein at pp. 13-18).*

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* All of these motions and applications of ours in the Court of Appeals were denied except for the granting of a remand hearing on electronic monitoring which excluded the Waldorf-Astoria bugging. Above all it would have been valuable to grant the motion for permission for Mr. Spindel to listen to the tapes, because he stated in his affidavit (App. B, *infra*, pp. A14-A17) that such listening could disclose whether a trespassory "parabolic mike" functioning had occurred (*id.* pp. A14-A15), and further whether an outright physically trespassory installation had been used; this latter, Mr. Spindel stated, could be determined by testing the tapes for extraneous sound and with an "oscilloscope" (*id.*, pp. A15-A17).

After the argument of the appeals in the Court below (January 19, 1967) there were additional pertinent developments in that Court revealing that the Government had not made full disclosure of its electronic eavesdropping activities relating to this case. This subject is treated in detail under our next subheading.

The Government's Reluctance to Make Disclosure

From the time of the Trial Judge's denial of the motion to suppress, and thereafter throughout the trial and down to the eve of the perfecting of the appeals in the Court of Appeals, defense counsel had been proceeding on the Government's assurances, as above noted, that the Waldorf-Astoria eavesdrop had been carried out in the manner described by the Government's agents (non-trespassorily), and that there had been no other electric monitoring.

Then, as above mentioned, in the briefs of the appellants in the Court of Appeals, filed in December 1966, after the "Schipani" development and after counsel had had an opportunity to reexamine the record in the comparative leisure of preparing the appeal, we reopened the question of the acceptability of the Government's factual description of the Waldorf monitoring techniques. As our suspicions became more and more aroused, we followed our briefs in the Court of Appeals with the above mentioned motion papers filed shortly before the oral argument of the appeals in which we requested "*Schipani*-type" review on a *de novo* and comprehensive basis to find out what the Government had actually done by way of electronic monitoring in this case* (see, in the Court below, the brief for

* We also raised at that juncture the question of the effect of President Johnson's order of June 30, 1965, discussed under a separate subheading at pp. 114 et seq., *infra*.

appellant Nebbia, pp. 9-37; the brief for appellants Dioguardi and Sutera, pp. 5-8; and the previously mentioned appellants' motions filed, respectively, on January 4 and 11, 1967, prior to oral argument, which was held January 19, 1967).

In those papers which we filed in the Court of Appeals in December 1966 and January 1967 we did not expressly contend, as we were not then in a position to do so, that additional electronic monitoring had occurred, but we did suggest the possibility and requested further inquiry on the Government's part. Despite these inquiries and challenges with which we kept barraging the Government at that juncture of the appeals, the Government made no mention of any other electronic monitoring in the several papers which it filed during that stage of the appeals or in its oral argument on January 19, 1967 (see the Government's printed Brief On Appeal filed shortly before the oral argument of January 19, 1967, its affidavits of January 5 and 19, 1967 and its letter to the Panel dated February 15, 1967). Indeed, in his letter of February 15, 1967, the United States Attorney stated that "the *Schipani* review procedure was undertaken with regard to this case and no notification has been made to this Court because our inquiry has produced no information within the scope of *Schipani* v. *United States*".

The next pertinent item, chronologically, was our "Motion For Permission To File Supplemental Statement For Appellants After Oral Argument", supported by affidavit of Abraham Glasser sworn to March 27, 1967. In that motion we asked the Court of Appeals to consider whether the United States Attorney's letter of February 15, 1967 (*supra*)

was a satisfactory response to the "Schipani" problems that had been posed to the Government in this case. (In our latter motion of March 27, 1967 we referred also to communications which had taken place between Mr. Glasser and the McClellan Committee concerning President Johnson's order of June 30, 1965; we shall return to this subject *infra*).*

The next pertinent development was a letter of April 18, 1967 from Mr. Fusaro, the Clerk of the Court of Appeals, requesting the United States Attorney to clarify his letter of February 15, 1967 (*supra*).

The next development was a letter to the Clerk of the Court of Appeals from the United States Attorney dated April 27, 1967, replying to the Clerk's letter of April 18 just mentioned, and stating insofar as here pertinent, as follows:

> "I am in receipt of your letter of April 18, 1967 regarding the above matter.
>
> In *Granello* v. *United States*, No. 750, this Term, *cert. denied*, April 24, 1967, the Department of Justice stated to the Supreme Court, in its brief at p. 19, n. 12 in opposition to the petitions for certiorari (copies of which are enclosed for the panel), that it believes its duty to disclose turns on whether something that is arguably material has been discovered. However, in view of the court's specific question, please advise the panel of the following: 1) there was no trespass committed in the monitoring litigated at the trial and at issue on appeal; 2) the review undertaken by the Department of Justice in this case pursuant to the policy enunciated in the Schipani Memorandum revealed two additional instances of electronic monitoring.

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* See the last preceding footnote.

a) On December 18, 1965, in Columbus, Georgia, agents of the Bureau of Narcotics installed an electronic listening device in an automobile prior to its rental by Jean Nebbia. The device did not work and no conversations were overheard or recorded. This office was not aware of the installation of this device at the time of the trial below.

b) Between April 25, 1962 and April 1, 1963 agents of the Federal Bureau of Investigation installed, by trespass, an electronic listening device in the business establishment in Miami, Florida of an individual having no connection with the instant case. In 1962, two and a half years before the inception of the conspiracy, defendant Frank Dioguardi was overheard as a participant in two conversations at said establishment. Logs reflecting the content of these conversations are available and show that none of the conversations related in any manner to this case. Neither the existence of the surveillance nor any information overheard was communicated to the Bureau of Narcotics or to Government counsel who prosecuted the case."

The next pertinent development was a letter (of 30 pages) to the Clerk of the Court of Appeals, dated May 1, 1967, by appellants' counsel Abraham Glasser, tracing the history of the Government's obstructions and evasions in making disclosures of its electronic eavesdropping activities, and again requesting a further electronic hearing. A copy of said letter is printed herewith as Appendix C, *infra*.*

Thereafter, on May 29, 1967, the Court of Appeals remanded the case to the District Judge for a hearing limited

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* This Appendix C item of ours is believed to be of special importance, for the reasons indicated in the text above. We respectfully ask leave to have our Appendix C incorporated as part of our argument in this Point II.

to the two instances of trespassory electronic eavesdropping first disclosed in the United States Attorney's letter of April 27, 1967, above quoted; and when, after this, defense counsel moved for amendment of the remand order of May 29, 1967 for enlargement of the remand to cover any and all electronic eavesdropping of any kind which may have related to this case, including the Waldorf-Astoria eavesdropping, the Court of Appeals enlarged the remand order (June 14, 1967) as prayed, but excluding the Waldorf-Astoria phase.

There was then held, during June and July 1967, the remand hearing (before Judge Palmieri). These remand proceedings were rather voluminous, but we respectfully contend that they were inadequate and that petitioners did not receive a fair due process hearing as to the Government's overall electronic activities in this case.

Against the background of obstructiveness by the Government we should have been granted the most plenary procedural facilities in the remand hearing. Specifically, the Government should have been required to submit its officers and records to unstinting examination. Instead, despite the *apparent* thoroughness of the remand proceeding, we were cut off from any real opportunity to probe the conclusory, self-serving "proof" of the Government denying "materiality" as to the two newly admitted trespassory buggings.

The District Judge concluded that the Georgia automobile bug had not functioned to produce any coherent evidence, and that the Florida bug had produced nothing relevant to this case (Pet. Cert., App. B, pp. 33a et seq.). The Court of Appeals in its opinion affirming the convictions, sum-

marized the latter conclusions of the District Judge, noted merely that defendants attacked those conclusions "on various grounds," and added merely "We have considered them all and do not find them persuasive" (Pet. Cert., App. A, at p. 24a).

We print as Appendix D to this brief, *infra*, a copy of the "Brief For Appellants After Remand Hearing *Re* Electronic Surveillance", which we filed in the Court of Appeals and which contains our detailed grounds for urging that the remand hearing had been procedurally unjust and indeed abortive.* (The latter brief, Appendix D *infra*, contains references to a brief which we had filed before District Judge Palmieri after the remand hearing; we believe that our Appendix D item, *infra*, is self-sufficient

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* The Government's obstructiveness in the remand hearing (tolerated by the District Court and unredressed by the Court of Appeals —all of which is fully described in Appendix D, *infra*) paralyzed our efforts to find out whether in truth nothing was overheard in the admittedly trespassory Georgia car bug or, more important, whether other buggings took place in Georgia. In the circumstances of this case—the Federal Narcotics Bureau's "all-time" "biggest" case, where the Bureau spared neither manpower nor technological exertions—it is practically incredible that no other bugging was done in Georgia. It is especially incredible that the Bureau did not bug Desist's room or tap his telephone at the Black Angus Motel in Columbus, Georgia; or that it did not bug Herman Conder at his home or at the Army Base in Georgia where he was stationed. But we were effectively blocked from exploring these prime probabilities at the remand hearing (again, all of this is thoroughly set forth in Appendix D, *infra*). The constitutional offensiveness of this obstructing of our efforts in the remand hearing is aggravated almost inexpressibly when one reflects that if the Government had not waited *until after the appeals from the convictions were argued* to disclose the "Schipani" car bugging in Georgia, i.e., if instead the Government had disclosed this before or during the trial (as was its duty), we surely could not have been thus obstructed in our questioning of the Agents or in subpoenaing other Government officials at the trial for a plenary exploration of the total actual Georgia bugging activity which we were blocked from effectively exploring at the belated mid-appeal remand hearing.

for present purposes without our also burdening the Court with a reprint of the brief before Judge Palmieri.)

We respectfully ask leave to have said Appendix D incorporated as part of our argument in this Point II.

At the very least, this Court should reverse to remand the case for a proper plenary hearing in which the Government may be compelled to make real disclosure, not merely a bureaucratic semblance of "disclosure".

Aside from the questions of the adequacy of the remand hearing as to electronic monitoring other than the Waldorf bugging, there persists the question of a new Waldorf hearing. In view of all of the foregoing it is difficult to understand the Court of Appeals' refusal to reopen the Waldorf-Astoria hearing. That refusal is in itself a ground for reversal here. The interests of both the Constitution and of standards of decency demanded a reopening of that hearing upon the showing which we made to the Court of Appeals as above described. To have denied such reopening either on the idea that the previous Waldorf-Astoria hearing had "adequately explored" the question of "trespass", or on the idea that we had already had one chance to convince a District Court Judge and must now resign ourselves, was to apply to the resolution of this profoundly important question of constitutional right and public morality too petty a standard of Federal appellate judiciality.

But even if relief is not to be forthcoming here to redress our claim of injustice in the refusal of the Court of Appeals to reopen the Waldorf-Astoria phase, the facts above summarized in regard to the Waldorf-Astoria bugging are be-

lieved to have afforded easily sufficient grounds for the Court of Appeals to conclude that, *on the existing record,* and on the then-existing (pre-*Katz*) standards, it was the duty of Federal appellate Judges to reject the District Court's finding of "no trespass" at the Waldorf-Astoria. And this Court can and should reject that finding, either on the grounds of the non-credibility of the agents' testimony, or on the grounds of acoustical and electronic science imported into this case by the presence of the double-door factor, or on the ground of the agents' admissions as to actual physical invasion of Nebbia's private air space in preparing for the electronic installation, or on the ground of the agents' use of the common electric current and wiring system to perpetrate an electronic invasion of privacy,* or on the ground of connivance with the hotel management to betray the privacy of a paying guest, or on all of these and the other grounds which seem to us to be favored by the record herein and by the *Silverman* case policy of refusal to tolerate "trespass" or physical instrusion "by even so much as a fraction of an inch".**

President Johnson's Order of June 30, 1965

In both of the Courts below we urged that if the Waldorf-Astoria bugging was done in defiance of a Presidential order it was unconstitutional because *ultra vires.*

The Solicitor General has alluded in papers filed by him in this Court, to a "policy" or "policies declared by the

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* Let police electronic snoopers at least be put to the necessity henceforth of using their own battery packs—such would be in accordance with pre-*Katz* standards.

** See, again, the further discussion of the pre-*Katz* "trespass" doctrine under the concluding subheading of this Point II, p. 118, *infra.*

President on June 30, 1965, for the entire Federal establishment" which "prohibits such electronic surveillance or the use of such listening devices (as well as the interception of telephone and other wireless communication) in all instances other than those involving the collection of intelligence affecting the national security". These words appear in two documents entitled "Supplemental Memorandum for the United States", one filed in *Black* v. *United States,* no. 1029, October Term 1965, at pp. 3-4; and the other filed in *Schipani* v. *United States,* No. 504, October Term 1966, at p. 4. In the *Black* memorandum the Solicitor General further said, "The specific authorization of the Attorney General must be obtained in each instance when this exception [national security] is invoked" (p. 4). In the *Schipani* memorandum the Solicitor General further stated that "such [national security] intelligence data will not be made available for prosecutorial purposes, and the specific authorization of the Attorney General must be obtained in each instance when the national security exception is sought to be invoked" (p. 4).

Counsel for the within petitioners endeavored during the appeals herein to find out from the Department of Justice in Washington what are the *exact textual* provisions of the above mentioned Presidential declaration of policy of June 30, 1965, but we have not been given an answer.

The reason why it is important for the purposes of the pre-*Katz* issues in this case (which we are arguing in this Point II), to find out if possible the exact terms of the President's policy statement of June 30, 1965, is that it is not clear from the Solicitor General's above mentioned memoranda in *Black* and *Schipani* whether the forms of

electronic surveillance prohibited by the President are specifically described in relation to "trespassory" *versus* "non-trespassory" types; or whether they are described in terms of legality or illegality as laid down in any specific Court decisions; or whether the President has prohibited all forms of electronic surveillance.

One thing, however, is manifest without further inquiry. If the Waldorf-Astoria electronic surveillance done in the present case comes within the ban of the President's statement of June 30, 1965, it must follow as the night the day that the within judgments of conviction must be reversed. For it is unthinkable that any person should be convicted and imprisoned on evidence obtained by Federal Police in express violation of a prohibition by the President of the United States and the Attorney General. The Government has conceded that the electronic bugging of Nebbia's hotel room in this case was not done with any authority or permission from the President or the Attorney General, but was done solely on the authority of the District Supervisor of the Federal Bureau of Narcotics, Mr. George M. Belk (R. 497-498). And, as seeen, the Waldorf bugging here involved post-dated the President's order of prohibition by nearly six months.

Absent a valid applicable statute of Congress, can there be any question that no officer or employee of any of the "executive departments" of the Federal Government may act in exercise of *executive power* in defiance of a presidential prohibition? The point is so elementary and so axiomatic as a matter of constitutional doctrine that it seems ingenuous to emphasize it; this Court has several times had occasion to refer to the President's intrinsic supremacy

over the executive departments through which he acts and which are merely his agents. "Executive power, in the main, must, of necessity, be exercised by the President through the various departments. These departments constitute his peculiar and intimate agencies * * *". *Russell Motor Car Co.* v. *United States,* 261 U.S. 514, 523. "The heads of departments are his authorized assistants in the performance of his executive duties * * *" (*Runkle* v. *United States,* 122 U.S. 543). What should be perceived then, when any Federal law enforcement official disobeys a prohibition of the President, without valid statutory warrant for such disobedience, is that the offending officer is simply acting *ultra vires.* Once attention is focused upon this feature of *ultra vires* in such a situation, it becomes apparent immediately that the disobedient conduct of the offending Federal police officer visits, upon any person aggrievingly touched by that disobedient conduct, a denial of due process of law in the most literal and classic sense of these words. "Process of law" is "due" only when it is in accordance with "law". If it is without "law", or against "law", then *eo ipse* it is not "due process of law". Electronic surveillance done by a Federal police officer in defiance of a direct prohibition of the President of the United States is the act of a usurper. No "process" endured at the hands of a governmental usurper can ever be "due process".

The Court below refused our request to compel the Government to disclose the text of the President's order. This Court should apply its hand for this purpose.*

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* See the typewritten "Supplemental Brief for Appellants", filed in the Court of Appeals January 25, 1967, after the argument of the appeals (mainly devoted to the subject of the Presidential order). If this item is not in the certified record in this Court (see p. 1, *supra,* fn.) we shall tender a certified copy to the Clerk. See also Appendix C hereto, *infra,* at pp. A40-A45, discussing the Presidential order.

Conclusion to Point II: The Need to Avoid an Oversimplified View of the Pre-*Katz* Standards Concerning "Trespass" *Vel Non;* the Quite Possibly Dispositive Effect of the Pre-*Katz* Decision in *Osborn* v. *United States,* 385 U.S. 323

We realize that the widely held view concerning the pre-*Katz* Federal case law on electronic eavesdropping—aside from the cases outlawing telephone wiretapping by reason of 49 U.S.C. § 605—is that if there has been a physical trespass in the property-law sense, the Courts will exclude the eavesdrop evidence, and not otherwise. Both of the Courts below applied this strict "trespass" view in the present case. This supposed posture of the pre-*Katz* case law is an over-simplification. The situation became considerably complicated by the *Silverman* decision, where the controlling opinion, by Mr. Justice Stewart, conspicuously refrained from grounding the decision on any technical physical trespass considerations, and formulated the matter instead in the more meaningful language of "an actual intrusion into a constitutionally protected area" (365 U.S. 505, 512).* In *Lopez* v. *United States,* 373 U.S. 427, 461, Mr. Justice Brennan in dissent (joined by Justices Douglas and Goldberg), flatly stated, without contradiction from his majority Brethren, that in *Silverman* the Court had " * * * expressly held * * * that an actual trespass need not be shown in order to support a violation of the Fourth Amendment. * * *". Nor, to our knowledge, has any member of the Court since the decision in *Lopez* (which was in May 1963), taken issue with Mr. Justice Brennan's enunciation of the meaning of the *Silverman* ruling. We therefore respectfully urge that

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* It is true that Justices Clark and Whittaker, concurring in the Majority opinion, in *Silverman,* spoke of the Majority's formulation as amounting to a finding of "sufficient trespass" (365 U.S. at 513); but that is not what the Majority opinion says.

the Court is free, under the applicable pre-*Katz* decisions, to decide the pre-*Katz* issue of Fourth Amendment eavesdrop constitutionality in our case without feeling compelled to confine its decisional choices within the Procrustean alternatives of "trespass" *versus* "no trespass." And if it be said that the Court's freedom of wise judicial choice in deciding our eavesdrop issue is circumscribed by *Pardo-Bolland, supra,* i.e., by the fact that the Court denied certiorari in that case, our answer is that—aside from the well-known fact that denial of certiorari does not express the Court's affirmative view on any issue involved—*Pardo-Bolland* did not have the double-door factor (with all of the attendant Fourth Amendment connotations previously suggested) which was present in the scene of the Nebbia Waldorf-Astoria eavesdrops. Nor, as we also earlier said, does *Pardo-Bolland* seem to have articulated (either on the part of the Courts or of the parties there) the combined Fourth Amendment and due process issue of impropriety in the secret cooperation of a trusted hotel host in treacherously betraying its guest to the police eavesdroppers.

Between the time of the decision in *Silverman* and that in *Katz,* the Court decided electronic eavesdrop issues (aside from telephone wiretapping issues) in *Lopez* v. *United States,* 373 U.S. 427; *Clinton* v. *Virginia,* 377 U.S. 178; *Osborn* v. *United States,* 385 U.S. 323; the series of decisions launched by *Black* v. *United States,* No. 1029, October Term 1965, and *Schipani* v. *United States,* 385 U.S. 372; and *Berger* v. *New York,* 385 U.S. 967. A brief consideration of these cases is worthwhile, we think, in trying to arrive at a meaningful sense of what the pre-*Katz* standards were and of how those standards should be applied to this case. (All of the above mentioned pre-*Katz* cases were decided before

the Court below affirmed the convictions in our case (October 13, 1967).)

Did any of the pre-*Katz* decisions mentioned in the above paragraph denote in any way a turn of tide away from *Silverman* towards more toleration of electronic monitoring? *Clinton, supra,* extended *Silverman* to the States. *Lopez, supra,* dealing toleratingly with a "minifon"-type device, was however succeeded by *Osborn, supra,* which upheld use of a similar device *only because Fourth Amendment standards of an advance judicial "warrant" procedure were deemed to have been effectively met.* The *Black-Schipani* series of decisions, *supra,* have been applying *Silverman* with undiminished and even increasing vigor. *Berger, supra,* applied *Silverman* and *Clinton* as against claims of an adequate Fourth Amendment advance judicial "warrant procedure."

There is nothing, then, in the scene of the decisions between *Silverman* and *Katz* to justify any conclusion other than that the doctrinal disfavorment of strict "trespass" theories first evidenced in *Silverman* has been a discernibly significant part of the pre-*Katz* standards throughout the operative times affecting this case.

Above all, *Osborn, supra,* portended the plenary principle of *Katz* and the doom of the "trespass" test. For, *Osborn* involved no unpermitted Fourth Amendment intrusion in terms of privacy of room premises, as the Waldorf bugging in our case does; in *Osborn* the electronic device was concealed on the person of a police agent who, Osborn thought, was a trusted associate of his. And still this Court in *Osborn* applied the Fourth Amendment requirement of an advance judicial "warrant". *It is not too*

much to say that Osborn, one year before Katz, laid down the same basic principle as in Katz, so far as concerns determination of the central issue in our case, namely, that the Fourth Amendment applies to "non-trespassory" electronic eavesdropping. In fact, *Osborn* goes further than *Katz,* and further than would be needed to reverse our case on pre-*Katz* grounds because, again, *Osborn* did not even involve *surreptitious* entry or *surreptitious* participation in the monitored conversation.

If we are correct in our above suggestions as to the impact of *Osborn,* the present case does not necessarily even turn at all on questions of retroactivity of *Katz,* and the judgment may be reversed on the pre-*Katz* standards as most notably instanced in *Osborn**.

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* We have not mentioned, in our above discussion of the decisions between the time of *Silverman* and the time of *Katz,* the case of *Hoffa* v. *United States,* 385 U.S. 293, because the *Hoffa* case did not involve electronic eavesdropping; the Fourth Amendment issue in *Hoffa* was in terms of a physical invasion, achieved through betrayal of trust by a companion, of the security of Hoffa's private hotel suite, and the Court found that Hoffa had not himself placed his reliance on the security of his hotel suite, but on his confidence, which turned out to be misplaced, in his chosen close personal associates.

POINT III*

Petitioners were denied a fair trial by the reception in evidence of electronic eavesdrop proofs which were probatively fatally defective in point of audibility, non-susceptibility to proper translation from the French into the English language, utterly defective language translation as actually attempted by the Government's and the Court's improper translational procedures, defective to the point of utter vitiation by reason of alleged processing or filtering of the tapes for the supposed purpose of eliminating "background noise", and unaccompanied by the requisite voice-identification of the eavesdropped speakers.

We are keenly aware that in criminal cases where conviction has been secured on the basis of electronic sound recordings, the reviewing Courts practically take it for granted that they will have to hear an argument about audibility, or other aspects of probative acceptability, of the recordings or of the human-witness auditor's testimony as to what he heard coming over on the electronic sound machinery. An understandable attitude of conditioned judicial skepticism may confront the party who offers such argument before an appellate court challenging the probative quality of the electronically obtained evidence. We respectfully assure this Court that despite our awareness of this "fact of life" in the contemporary appellate arena which is inclined to be so inhospitable to arguments of this type as to inaudibility, etc., we feel absolutely justified in making the argument of non-probativeness in this case

* As noted in Point I, *supra*, the subject of this Point III is relevant to the issue of retroactivity of the *Katz* case because this subject affects the "integrity of the fact-finding process" in this trial owing to the probative defectiveness of the electronically obtained evidence.

because the record proofs in support thereof seem to us overwhelming.

The electronic eavesdrop tapes in our case present one important non-typical feature, namely, that they purport to record conversations in a foreign language (French). Immediately, therefore, there was presented for the English-speaking jurors in this trial an intrinsic barrier of communication in listening to these "proofs". And defense counsel at the trial had a duty to their clients to insist that the French-language contents of the tapes be *properly* proved for the understanding and just consideration of a jury of English-speaking persons.

How did defense counsel try to carry out this duty? We took the position, quite simply (and we believe justly), that the only unexceptionably fair way that these French-language eavesdrop recordings could be communicated to a jury in a criminal trial that was being conducted in the English language, was by having an impartial Court-appointed qualified translator or interpreter who could render a *simultaneous translation* (insofar as possible) of the French-language sounds that were audible on the tapes then and there as played in the Courtroom for the jury, i.e., we urged that a neutral and impartial translator or interpreter should be made available to "accompany" the jurors so to say, on a word by word or phrase by phrase or sentence by sentence basis as the tapes were being played for the jury just as a simultaneous translator would do in translating then and there the testimony of a live witness. This position, which we think was the only *fair* and indeed necessary position for the Court to take, was repeatedly but unavailingly urged by us before the jury heard the

tapes as "evidence" (Tr. of April 27, 1966, 50-51; R. 408-438, 454, 458, 487, 542-546).

What was the procedure insisted upon by Judge Palmieri to deal with this problem of laying before the jurors a fair and proper translation of the tapes? The Trial Court was of the view that, since agent Kiere* spoke French, and since the Court itself and one or two colleagues of counsel for one of the defendants (Nebbia) had some fluency in the French language, it would be practical and fair for the Court to hold *in camera* sessions with counsel and Kiere to try to arrive at an "agreed translation" of the tapes. From the outset, i.e., as soon as defense counsel perceived that this was Judge Palmieri's proposed solution of the problem of how to give the jurors a probatively acceptable translation of the tapes, defense counsel expressed their objections, and they pressed their request above noted for a proper translation procedure whereby the jurors would receive the French-to-English translation of the tapes in a proper trial-proof setting, viz., by having a court-appointed qualified interpreter who could render simultaneous translation for the jurors while the tapes were being played for them as evidence. See, again, R. 398, 408-438, 458, 487, 542-546.

At one point in the *in camera* proceedings above referred to, agent Kiere revealed that in preparing his own written translation transcripts of the tapes in his pre-trial auditings, he had written down his results in the form of a transcription directly from French into English, and that he had not prepared any French transcript or any bi-lingual French-English translation (R. 398).

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* Who had done the Waldorf monitoring and through whom the Government introduced the products of the monitoring at the trial (*supra*).

When the time came to play the tapes before the jury, with agent Kiere performing his supposedly impartial "simultaneous translation", the results were grotesque. This translation performance by agent Kiere is in the record at R. 564, 568-586, 590-593, 596, 599-600, 602-610, 610, 627. Agent Kiere performed these prodigies of "probativeness" as to tape recordings which were pervasively inaudible or unintelligible and in a foreign language, before a courtroom assemblage in which almost no one (and surely no juror, so far as we know) could understand French, with the continual assistance, moreover, of his own "exhibits" consisting of his pre-trial "transcripts" of the translation of the tapes which he himself had made. See especially R. 566-567, 569-572.

We categorically state that, what with the egregious inaudibility and unintelligibility of the tapes plus their being in a foreign language, no truly *impartial* qualified translator could have produced for the jurors' ears the tendentious results self-servingly achieved by agent Kiere.

If the Court had granted our request for an impartial translator the basic testimonial procedure by such a witness would have had to be quite different from what agent Kiere did. In the first place, agent Kiere admitted that owing to difficulties of audibility and intelligibility, he had to spend some seventy-five *hours* in translating the taped items involved, which ran for only some forty-five *minutes* (*e.g.*, R. 471-473). Is it conceivable that an impartial court-appointed translator would ever have been permitted to keep chewing away thus endlessly at these defective sound recordings in order to try to chew a "translation" out of them? Defense counsel needless to say would have insisted that the impartial translator be permitted advance access

to the tapes only for such reasonable amount of repeated playings as would be consistent with a fair standard for acceptance or rejection of such recordings on the basis of how readily or how poorly the human ear could really detect intelligible meaning in the sound.

In other words, the impartial translator problem in this case merged with the problem of probativeness in point of audibility and intelligibility; and consequently it was fundamentally unfair to turn over to the tender mercies of a member of the prosecution's own staff (Kiere), *both* the problem of proper translation *and* the problem of audibility and intelligibility.

Be it always remembered, the jurors themselves did not and could not know what was being said in French on the tapes, or even whether this or that French sound was really audible or intelligible at all. The jury had to depend absolutely upon its translator. That person should not have been a member of the prosecution's staff.

Nor was it any answer for the Court to tell defense counsel, as it did, that we could cross-examine Kiere on his translation, or that we could bring in our own translator to rebut Kiere. This would have been a cumbersome procedure that would be almost bound to harm the defense, unfairly, in the jury's eyes, by its sheer tedium, and by the undignified spectacle which it would have created of the defendants' lawyers and *their* translator vying with the Government and *its* "official" translator. And any such procedure would have missed the real mark anyhow because of the intermingling of the translation problem with the audibility-intelligibility problem. What realistic good would it have done the defense to put on the stand their own translator

who, albeit he could do so with perfect truthfulness, would find himself in continual clashes with the Government's translator simply on the question of what could or could not be heard or understood. The scene would have been one in which agent Kiere would keep saying, 'yes I heard this', or 'yes I understood that', and the defense "rebuttal" translator would have to be saying 'no he didn't, because I didn't'.

There was only one way to avoid all this, and that was by Court appointment of an impartial translator as above suggested.

What was probably the climax of unfairness in the translation procedure insisted upon by the Court, occurred at R. 570-571, when the Court, in responding to an objection by defense counsel that Kiere was evidently leaning too much on his previously prepared written translation (Government's Exhibit 20 for identification), said to Kiere (referring to the latter exhibit) "this is a word-for-word translation of this tape, is that right" to which Kiere obligingly replied, "yes, your Honor"; whereupon defense counsel of course immediately objected, in response to which the Court saw fit to reply as follows (in the hearing of the jury, be it noted):

> "You made it necessary. I can't leave it a mystery any longer, Mr. Edelbaum. He is looking at this and I want the jury to know what he is looking at because I think it would be unfair to this jury to raise a question that he is looking at something improper. I want the jury to know what he is looking at." (R. 570-571)

Understandably appalled, defense counsel moved for a mistrial, which was denied (R. 571).

We had not ever wanted that the jury should obtain its "translation" of the possibly vital content of the French-

language tapes through the methods that the Court had insisted upon; we had not wanted agent Kiere to be apotheosized as the "impartial translator" before the jury. How unjust, then, for the Court to announce before the jury that agent Kiere's self-serving written translation, prepared by him pre-trial and ex parte, and only after prodigious travail (seventy-five hours by his own account) in trying to overcome insuperable difficulties of audibility and intelligibility, was "a word-for-word translation of this tape."

There is another important aspect concerning the probative quality of these tapes. On the Nebbia-Desist tape of December 16, 1965, the Government had sent the original tape to an outside company to try to improve audibility by filtering out extraneous noises (R. 346-347, 385-395). A representative of the outside company was brought before the Court in an *in camera* session which preceded the playing of the tapes to the jury (*ibid*). This man, Tony Roberts, gave only the most general sort of information as to what his company had done on the filtering job, and defense counsel took the position that Roberts should be brought back to be examined in detail before the jury, i.e., after defense counsel had had an opportunity to compare and study in a thorough way both the original tape and the treated tape (*ibid*). But the Government never brought Roberts back, and, over defense objections, the filtered tape was played to the jury without any anterior testimony as to its probative competence in view of its having been produced in the manner above indicated. The Court denied a specific request by the defense that Kiere not be permitted to testify on the basis of the filtered tape until the jury should first have heard the unfiltered tape (R. 486-491).

As regards the details of the actual courtroom performance of agent Kiere in giving the jury his running translation (with the aid of his written transcript), see R. 564, 568-586, 590-593, 596, 599-600, 602-610, 610-627. The cross-examination of Kiere on this subject revealed, on item after item, grave flaws of audibility and translation (e.g., R. 719-728, 741-747, 729-741, 885-894, 924-930).

At R. 714, when Kiere was asked to what extent his testimony as to what he himself had heard coming through on the electronic machinery (R. 553-563) had been based on his memory of what he actually heard or instead had been based on having repeatedly heard the tapes played over and over again, Kiere frankly replied. "I honestly don't remember which I remember independently and which I remember from the tapes."

Now, if there is any one point agreed upon in the authorities on the subject of authentication of sound recordings to render them probatively admissible in evidence, it is that there must be a showing that the recording device was capable of taking testimony, and the required method of making this indispensable showing is by testimony from a human monitor of the recording stating that he could himself hear what was coming over the recording device; see 58 A.L.R. 2d 1024, 1027, 1032, 1033, 1034 ("Admissibility of Sound Recordings in Evidence"). We submit that the above-acknowledgement by agent Kiere that he simply did not know what he himself had actually overheard on the eavesdrop device and what he now thought he may have overheard but which could have come instead from replaying the tapes, required exclusion of these tapes on the ground alone of the rule of admissibility just cited.

And if there is any other basic and indispensable requirement for admissibility of sound recordings it is that there be a proper identification of the voices of the alleged speakers (*id.*, at pp. 1032-1036). The proofs in this trial as to voice identification were inadequate practically to the point of being ridiculous. It is undisputed that Kiere had no familiarity with (in fact he had never heard) the voices of Nebbia, Desist or LeFranc when he first purported to identify their voices on the electronic listening device (*e.g.*, R. 508, 588-589, 641-646, 689-691, 776-785, 846-853, 866, 930-953, 970-980). The way that the Government undertook to establish such voice identification was by testimony from another agent that he had used binoculars, a 7 x 50 Navy type, to peer into Nebbia's room from the rooftop and from a room of another hotel, the distance involved being approximately 380 feet, the conditions of visibility being that it was dusk (in the 4:30 P.M., December 17 observation involving Nebbia and LeFranc) or nighttime (in the 8 to 8:30 P.M. observation involving Nebbia and Desist on December 16), and the testimony being hopelessly unclear as to just how much of the window aperture of Nebbia's room was exposed to view as regards curtains, window shades or blinds (R. 362-367, 1174-1186, 1252-1276, 1281-1293, 1316, 1334, 1340-1349).

Casting extreme doubt on the reliability or veracity of this testimony of binocular observation are the following circumstances regarding the alleged observation of Desist in Nebbia's room at around 8 P.M. on December 16. Desist called a witness who swore that Desist had been in his company that entire evening from about 7 P.M. on; this witness, Alriq, is the owner of a fashionable and reputable restaurant in New York City; his testimony was positive, unequivocal and altogether circumstantially detailed; his

testimony remained entirely unshaken on cross examination (R. 1624-1636). We are not of course suggesting that this testimony of Alriq "proves" that the Government's binocular witness was lying or mistaken, and we realize this was a matter for the Jury. We are mentioning this Alriq item (1) because it did *pro tanto* (as to Desist) negate the *only* "voice identification" proof of the Government* in connection with these dismally "probative" (and unconstitutional electronic recordings; and (2) because it ties in rather interestingly with another item which we believe has an important bearing on this whole question of the reliability of the voice identification proofs based on the alleged binocular surveillance. It was taken as established at the trial that Desist went by plane to Rochester after the alleged conversation with Nebbia, and that from Rochester Desist went by plane to Columbus, Georgia where, according to Conder's testimony, the latter met Desist at the airport (59a-60a). Now, all of this New York-Rochester-Columbus plane travel by Desist is supposed to have been revealed to the agents through the eavesdropped Nebbia-Desist conversation on the evening of December 16 (60a). With this last fact in mind, it becomes important to have in mind also that, according to the Government's theory of the case, the whole crux or central object of the investigation was to locate the mysterious person to whom Desist, Nebbia and LeFranc were supposed to be going, somewhere in Georgia, to take possession of the hoard of narcotics. With these points in mind, does it not become very puzzling, at the least, that the Government evidently did not follow Desist from New York to Rochester, or from Rochester to Columbus, Georgia where (again, according to Conder)

* The binocular-observation proof, *supra*.

Conder met Desist at the airport? The Government says that it discovered Conder only at a later stage, and as it were by accident or luck at that, in a scene in which the agents unexpectedly stumbled upon Desist while the latter was sitting in a restaurant with Conder (62a). We repeat, if the Government knew, as it claims from allegedly having overheard Desist and Nebbia on December 16 (*and from having supposedly identified Desist with binoculars at that same time*), that Desist was going to Rochester and Columbus, why did not the Government follow Desist in the quest for the prime prey whom they were supposedly stalking, namely, Conder? With the massive and intensive investigative resources which the Government is supposed to have thrown into this case from the time of Nebbia's arrival in the United States, is it conceivable that the Government would not have followed Desist to Rochester and Columbus *if the Government had really known that he was going to those places,* which, again, the Government says it did know from the Nebbia-Desist eavesdrops and from the ostensibly simultaneous binocular observation and "voice identification"?*

As above said, the issue of Desist's "alibi"-type testimony *per* the restaurant witness Alriq, was in itself naturally an issue for the Jury. But this Alriq testimony, when considered together with the above suggested anomaly (the politest word we can think of in the circumstances) of the Government's failure to trail Desist when it claims it knew

* In fact, Kiere testified (p. 14, *supra*—see R. 558) that in bugging the Nebbia-Desist conversation at the Waldorf he heard Desist say he was going *to Rochester "to see the boss"*. If the Government knew this (by "identifying" Desist at that binocular-viewed conversation with Nebbia), why is this record silent as to any surveillance of Desist en route to or in Rochester?

through eavesdropping that he was going to Rochester* and to Georgia, presents for this Court's consideration, we submit, a "non-jury" issue, i.e., an issue of "law" in point of the admissibility of a crucial part of the Government's proof, namely, the issue of the adequacy of the legally requisite and indispensable proof of "voice identification" as a pre-condition of the reception in evidence of the tape recordings. In other words, our above analysis is believed to give the strongest kind of indication that the Government's binocular proof of Desist's being seen in Nebbia's room at the time of the December 16 eavesdrop is too untrustworthy to be accepted on the vital issue of admissibility of the recording. And if the binocular testimony is thus vulnerable as to the Desist-Nebbia episode, what is its value as to the LeFranc-Nebbia episode?

Further indications of the unreliability, if not indeed the utter spuriousness, of the voice identification proofs appear at R. 508, 588-589, 640-646, 689-691, 694, 776-785, 846-853, 866, 930-953, 957-959, 970-980.

We therefore submit, for all of the above reasons, that the Government's proofs based on the tape recordings were, taken in their entirety, far below the standard of probative acceptability for proofs of this type (see, again, the Annotation previously cited, 58 A.L.R. 2d 1024). The defectiveness in this proof resided both in the serious credibility problems discussed immediately above, and in the gross and pervasive technical imperfection of the recordings and of the whole French translation procedure which we have above described.

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* See the last preceding footnote.

In conclusion on this branch of our argument, the frequency with which imperfect recordings do receive judicial acceptance in this country prompts us to comment as follows: Would the courts of this country tolerate, in the proffering of any other form of evidence, for example, documentary evidence, such physical imperfections, such pervasive lacunae, such fragmentation and shredding and all-around spoilage of the "text", such clumsy mutilation, such net undecipherability as in the eavesdrop recordings here involved? Would our courts tolerate, in any documentary proof, or in any human witness' memory on the stand, this patchy, disintegrated sort of probativeness? What is there about electronic eavesdropping that should so often endow it, above all other modes of proof, with such a unique undeclared but effective immunity from the traditional rules of Anglo-American judicial proof? Electronic eavesdropping, because of its offensiveness to the civilized decencies of a free society, and not less because of its susceptibility to "gaps" and "inaudible parts" as is so dramatically instanced in this case—why is that one never seems to get audible police recordings which are *exculpatory* of a defendant—ought to be treated, under the tests of probativeness, as the lowest, not the highest quality of proof is treated.

POINT IV

The judgments of conviction against petitioners Dioguardi and Sutera should be reversed because there was insufficient evidence for submission to the jury, or for conviction under the rule of reasonable doubt, on the essential element of knowledge of importation of narcotics—there concededly being no proof whatever of conspiracy to import on the part of Dioguardi and Sutera, and there being likewise no proof of actual or constructive possession subsequent to importation.

The Trial Court charged the Jury that (48a):

> "In this case I charge you as a matter of law that you cannot find that the defendants Dioguardi and Sutera were in possession, actual or constructive, of the drugs at any time. As to them you must find actual knowledge that the drugs were illegally imported from abroad. If you fail to find such actual knowledge on the part of Dioguardi and Sutera beyond a reasonable doubt, I charge you it is your duty to acquit them.
>
> In furtherance of its contention that they had actual knowledge, however, the government asserts that their meeting with LeFranc, a Frenchman, who allegedly informed them that, "It was here already," meaning, the government says, in the United States, along with other evidence is sufficient basis for the conclusion that Dioguardi and Sutera knew the drugs to have been illegally imported."

Thus, this entire case against Dioguardi and Sutera stands or falls, literally, on the question of whether the Trial Court was correct (as a matter of law) in letting the Jury consider the indispensable issue of actual knowledge of importation on the basis of absolutely nothing more than the

single item of testimony referred to by the Court as above quoted, i.e., "It was here already".

Before we examine further the import of the words "It was [or is] here already" we may briefly dispose of the Trial Court's further reference in the above quoted instruction to "other evidence" or "along with other evidence" which, according to the Trial Court, the Government claimed also showed actual knowledge of importation. It may be categorically stated that this reference by the Trial Court to any such "other evidence" is incomprehensible because it is without any support whatever in the record. The Government's requests to charge no's 16 (re knowledge of illegal importation) and 21 (re the proofs as a whole concerning Dioguardi and Sutera) embody, we take it, the entirety of the Government's factual contentions against Dioguardi and Sutera in this case. They give no slightest hint of anything on the issue of actual knowledge of importation beyond the above noted words "It is here already"..We await with interest any demonstration by the Government in its brief in this Court that the record contains, on the issue of Dioguardi's and Sutera's actual knowledge of importation, any such "other evidence" as was apparently suggested by the Trial Court in its above quoted charge to the Jury.

Let us now examine the words "It is here already". (Naturally, in undertaking an examination of these words we are assuming *arguendo* that the words may in fact be probatively taken as referring to narcotics rather than to some other items or transactions—as to which see further *infra.*) Even if the words "It is here already" refer to narcotics, then, those words do not establish that "here" was being used in contradistinction to "there" as referring to

a foreign country. The word "here" may just as rationally mean "here" someplace in the United States as distinguished from some other place in the United States. Can it be denied that it is nothing more than the merest (and the most unjust) speculation to attach to the word "here", in the instant context, a meaning *beyond a reasonable doubt* that the word meant, to its alleged users, that an importation from a foreign country was involved. We respectfully repeat, it would be the sheerest speculation, and an unthinkable perversion of the rule of reasonable doubt, to urge that the word "here" or the words "here already" may justifiably, or much less must, be understood as referring to importation "beyond a reasonable doubt." Fairness requires looking the facts in the face in this critical matter involving such heavy jail sentences. Is there any other fact or shred of fact in this alleged scene to justify the conclusion of a reference to importation "beyond a reasonable doubt", other than the single fact that LeFranc happened to be a person who spoke with a French accent? If Dioguardi's fifteen-year jail sentence, and Sutera's ten-year jail sentence, are to be sustained on anything besides the inconclusive four words "it is here already," the fact must be faced that it would be so simply and only because they were allegedly talking to a man with a French accent.

We respectfully submit that it is inconceivable that Federal criminal justice, even allowing for the attritions of fair justice effected in recent decades by the conspiracy-prosecution device and by the "presumption" philosophy, could consign a man to ten or fifteen years imprisonment merely because, in an alleged narcotics case, he was talking negotiatorily (allegedly) to a putative "foreigner" who spoke the cryptic words "It is here already."

The issue of Dioguardi's and Sutera's actual knowledge of illegal importation should never have been submitted to the Jury. The Jury's finding of guilt on this issue cannot be even remotely reconciled with the rule of reasonable doubt.

POINT V

The judgments of conviction as to appellants Dioguardi and Sutera should be reversed for insufficiency of evidence on the conspiracy charge in any aspect.

Aside from the argument tendered in our Point IV, *supra,* as to actual knowledge of illegal importation, we also respectfully urge that the evidence was insufficient altogether to link Dioguardi and Sutera to any charge of narcotics conspiracy.

We realize that the Government's basic reasoning in support of the conspiracy charge against Dioguardi and Sutera is that, if the testimony of the agents is believed, Dioguardi and Sutera conducted with LeFranc a conversation which, albeit ambiguous and even amorphous, is susceptible of being construed as denoting that what the parties were allegedly discussing was some kind of "transfer" to Dioguardi and Sutera of the narcotics in Georgia which the Government contends LeFranc (with Nebbia and Desist) was planning to obtain from Desist's contact man in Georgia (allegedly Conder).

However this is not a case for free-wheeling interpretation of people's conversations. It is a criminal case, governed by the rules of the criminal law, including the rule of reasonable doubt. There is a limit to the number and to the attenuation of the assumptions which may be indulged

in a criminal prosecutive situation of this kind. Suspicion is not enough, and *any* speculation is surely wrong in such a situation.

Narcotics were not mentioned in the alleged conversation at the Adano Restaurant. All that was allegedly mentioned was "it"; what is the antecedent of "it"?. True, it was urged by the Government below (successfully) that "it" meant "merchandise" and that "merchandise" meant heroin. The lexicographers whose authority was deemed judicially probative (and for the purposes of criminal proof, to boot) on the meaning of "merchandise" were a couple of narcotics agents who were blithely asked, were blithely permitted to answer, and blithely answered that *to them* "merchandise" meant narcotics!

Here again, we respectfully ask, is this the stuff of fair and just due process criminal conviction in this country at the present era?

The question is not whether "merchandise" might well, in various settings, vernacularly mean narcotics. The question is, rather, whether this kind of word usage or word understanding, testified to by ardent institutional gentlemen of the police-minded orientation here involved, has a place in the solemn and dread procedure of the proof of facts at a trial for crime in a Federal Court.

The total corpus of the allegedly inculpative facts against Dioguardi and Sutera—deriving solely, it must always be remembered, from the single alleged conversation with LeFranc at the Adano Restaurant— is too insubstantial, too thin, too *doubtful,* to admit of criminal conviction under the rule of reasonable doubt.

Suspicion there is in this record against Dioguardi and Sutera; we would be foolish to deny it. But is there *adequate* proof of criminal guilt under the charges of this indictment? There is not even proof that a bargain had definitely been struck between Dioguardi-Sutera and LeFranc. *If the Trial Court had thought a bargain was struck, or that the proofs allowed a conclusion to that effect, would the Court have gone to such pains to declare to the Jury as a matter of law that they could not find that Dioguardi and Sutera had even constructive possession of narcotics?*

The whole case against Dioguardi and Sutera is too vague, too remote, too indefinite and uncertain for the purposes of the standard here operative, the standard of reasonable doubt.

Cf. *United States* v. *Cianchetti*, 315 F. 2d 584 (C.A. 2 1963), where failure to prove consummation of alleged conspiratorial overtures or negotiations in a situation far more concretely evolved towards criminality than this one, was held to require reversal of the conviction and dismissal of the indictment.

POINT VI

The judgments of conviction against petitioners Dioguardi and Sutera should be reversed because they were denied a fair trial by the Court's prejudicial conduct in responding to a request by the jury, after the jury had retired to consider its verdict, for testimony relating to the conversations overheard by the agents at the Adano restaurant.

At 150a-156a, after the Jury had retired to consider its verdict, the following occurred:

"(At 6:20 p.m., a note was received from the jury.)

(Marked Court's Exhibit 11.)

* * * * *

The Court: I am sending this note in answer to the jury's note, which reads as follows:

'We would like Agent Gruden's and Agent Smith's testimony as to what was overheard at the bar at Adano's restaurant.'

I am sending this note:

'Ladies and gentlemen of the jury, your request for testimony of Agents Gruden and Smith will be read at the time when you return from dinner. It will take some time to read, and I do not wish to interfere with the dinner arrangements made for you.'

* * * * *

(The following took place in the robing room at 8:00 p.m.)

Mr. M. Edelbaum: What is the question again? That is what I want to find out. I want to get the note. What was the note, exactly?

Your Honor, I ask that page 1301 be read to the jury, page 1302 because particularly at page 1302:

'Q. Just prior to when he left, at the bar, he told you, "I heard them saying this"? A. I asked him what they were talking about before I got in and he told me.

'Q. And was this in a whisper? A. No, this was—'

I say that all relates to conversation, and I ask that it be read.

The Court: The jurors' request is, 'We would like Agents Gruden's and Smith's testimony as to what was overheard in the bar at Adano's Restaurant.'

* * * * *

This conversation which you have just read has to do with what the agents say to each other, not what they overheard.

I deny your request.

Mr. M. Edelbaum: I also ask that page 1303 be read to the jury.

The Court: I don't see anything there that indicates what he overheard.

Mr. M. Edelbaum: It all deals with the same episode, and I submit to your Honor it is proper to be read.

And I ask that pages 1304, 1305—

The Court: Will you please refer me to the question, the line on 1303 that indicates what was overheard by agents Gruden and Smith?

Mr. M. Edelbaum: It is the situation that was there. I don't think that the request should be interpreted literally. I think they are entitled to know the situation, what they could hear and whether they could hear it and what was heard. I am asking for 1304, 1305, 1306, 1307, 1308 (2513) to be read to the jury.

The Court: I deny your request on the ground that there is nothing in those pages which constitutes overheard conversations.

Mr. Jones: Most respectfully, your Honor, I join Mr. Edelbaum and additionally request the following pages read of the different agents' testimony which reflect the different circumstances of the incident with the phone call.

The Court: That is not what the jury has requested. They want the agents' testimony as to what was overheard. I realize that you gentlemen have a very litigious interest in producing all of the surrounding circumstances in an effort to upset that testimony in the jury's opinion, but that is not what they have asked for.

Mr. Jones: Most respectfully, your Honor, we would request the following pages of Gruden's: 1059. Smith, 1138 and 1139, 1188, 1296, 1297 and 1298, all in connection with the same incident.

The Court: I have gone through all of the direct testimony, and if any of those pages include overheard conversation they will be read, and if they do not include overheard conversation (2514) they will not be read.

If you have any references to any pages—

Mr. Jones: 1059, 1060.

The Court: That is all included.

Mr. M. Edelbaum: Is this on the record?

Your Honor, *I think that the cross-examination should be read to this jury to show the context as to whether or not the agents actually did overhear what they claim they overheard on direct examination, and the whole purport of the cross examination was towards that, not to ask them to repeat what was said on direct examination, and that the direct examination, if the direct examination is read as to what was heard, we are entitled to have the cross examination heard. I rest on that.*

Mr. Jones: The cross examination goes as to what was said.

The Court: Not at all. You gentlemen were careful to steer away from what was overheard. You did your best—and of course I have no criticism—in trying to demolish the credibility of the agents' testimony. But in this case the jury has asked a specific question about testimony as to what was overheard. I underscore the word 'overheard.'

* * * * *

Mr. M. Edelbaum: What about 1130?

The Court: I don't see anything there as to what he heard.

If you will point it out—what is there that he overheard?

Mr. M. Edelbaum: Your Honor, it shows that he couldn't overhear. Now, before your Honor gets that way, if you will just go back to 1108, and the best thing that I can point out that the cross examination be read is by reading that page. 1108. Your Honor denied it, and I am satisfied to leave it on the record. 1109.

(2516) The Court: Denied. I see nothing on that—

* * * * *

I see nothing on pages 1108 or 1109 which constitute testimony of overheard conversations, and for that reason I deny your request.

Mr. Jones: For the record, I join in the request.

(The proceedings resumed in open court, jury in box.)

The Court: Ladies and gentlemen, I have received your note:

'We would like Agent Gruden's and Agent Smith's testimony as to what was overheard at the bar at Adano's Restaurant.'

The stenographer is prepared to read that. We will hear both the direct and cross examinations of Agents Gruden and Smith in those passages where they testified with respect to overheard conversations.

(The following portions of the record (2517) were read to the jury:)

Page 1056 line 17 to 1064 line 24. 1096 line 5 to 1097 line 9.

1101 line 1 to 1102 line 23. 1128 line 1 to 1130 line 18. 1139 line 4 to 1143 line 7. 1144 line 3 to 1145 line 8.

The Court: All right, ladies and gentlemen, your request has been granted, and you may withdraw.

(At 8:35 p.m., the jury left the courtroom.)

Mr. M. Edelbaum: Your Honor, does the record denote exactly what was read? There was no other stenographer here while the reporter was reading. May we have it endorsed on the record, each question and answer that was read, have that included in the record, to this jury? I want placed on the record exactly what he read.

The Court: I direct the stenographer, in accordance with the request of defense counsel, to make a note on the record of every page that was read and every line, indicating the starting and the ending line in each passage.

Mr. Jones: Your Honor, at this time we (2518) further renew the motion of the conversation concerning the telephone incidents be allowed in at this time, since your Honor allowed him to read the conversations on the phone and what he overheard at this time. Therefore, this is not what was at the bar. It goes further in scope. Therefore, we should be allowed to bring in what was heard in relation to these phone calls, because the note, as I recall it,

only says as to what was at the bar. However, we have heard all kinds of testimony as to what he allegedly heard at the phone. Therefore, I submit we should be able to bring in at this time the other circumstances surrounding these phone calls.

The Court: All right. You may have an exception.

Mr. M. Edelbaum: May I just point out one other thing: Your Honor even permitted the stenographer to read to the jury, 'What does the word "merchandise" mean to you,' the definition of that, that it meant narcotics.

What that has to do with the question I fail to understand in view of your Honor's refusal to permit us to have the cross examination (2519) read.

The Court: All right. I am sorry you are displeased, gentlemen.

Mr. M. Edelbaum: I am displeased on behalf of my client.

The Court: I had the stenographer read the testimony that was heard in the bar in Adano's Restaurant. This telephone was a wall phone, practically adjacent to the bar. And you never raised this question before. I though that I was complying in good faith with the jury's request, and I am sorry that your very able cross examination was not included, but it was not asked for." (Emphasis supplied)

It is submitted that Dioguardi and Sutera were prejudiced in the extreme by the Court's insistence upon treating the above request to the Jury in so one-sided and restrictive a way. The testimony for which the Jury asked was the dispositive testimony, one way or the other, affecting Dioguardi and Sutera. As seen, the testimony of the two agents

mentioned by the Jury had been subjected to the most intensely grilling cross examination (see the statement of the case, pp. 29-31, *supra*). Defense counsel therefore asked the Court, in responding to the above quoted note from the Jury, to let the Jury have the entire relevant cross examination as well as the direct testimony of the agents. The Court absolutely refused, however, to construe the Jury's note as calling for anything except that which "the agents said they overheard"; the Court insisted on reading the language of the Jury's note as though it were construing a negotiable instrument or a statute of Congress. Yet at the same time, in a puzzling further departure from fairness, the Court gave the Jury something else which they had *not* asked for, at least they had not asked for it under a "strict construction" of their note. We refer to that other conversation, not "at the bar at Adano Restaurant" (the language of the Jury's note), but at a telephone in that restaurant to which Dioguardi had gone alone two or three times during that evening.

This erroneous and unfair way in which the Trial Court administered the vital portion of the proceeding involving the above quoted note of the Jury is believed to have had an altogether probably decisive effect adverse to Dioguardi and Sutera in this case, which as to them was so weakly proved and in which the balance might so readily have swung in their favor.

POINT VII

Petitioner Nebbia (and by prejudicial overflow the other petitioners) was denied a fair trial, due process of law, the constitutional right of confrontation with the witnesses against him, the effective right to be present at his trial, and the effective assistance of counsel, by the refusal of the trial court to provide Nebbia with an impartial, court-appointed French interpreter qualified to render simultaneous translation for Nebbia's understanding of the proceedings.

Commencing in the pretrial proceedings, counsel for Nebbia apprised Judge Palmieri that Nebbia has no understanding of the English language—a fact which is undisputed—and requested the Court to provide a French translator qualified to render simultaneous translation; this request, and objections based on denial of the request, were repeatedly urged by Nebbia's counsel throughout the trial proceedings and were denied (see Tr. of April 27, 1966, pp. 30-36, 44-46, 47-49; Tr. May 18, 1966, pp. 60-66; Tr. June 7-8, 1966, pp. 72-76, 78-86, 234-237; R. 349, 1949, 2030 et seq., 2174-2175; sentencing minutes, August 30, 1966, pp. 24-27).

It is of interest that, when the request for an interpreter was first broached, the intrinsic and obvious fairness of the request apparently struck Judge Palmieri's mind as self-evident, and the Judge spontaneously expressed himself in a gracious and receptive manner concerning the request, stating however that he was not certain of his authority to grant the request at public financial expense and that he would look into the matter (Tr. of April 27, 1966, pp. 30-36).

However, on the next occasion (pretrial) when the matter again came up, at the proceedings of May 18, 1966, the Gov-

ernment vigorously objected to assuming the financial expense because Nebbia was not indigent, and the Court announced that, having been able to find no authority for requiring the Government to undertake the expense, the request would be refused (Tr. of May 18, 1966, pp. 60-66). The request was further urged at the final pretrial proceedings, June 7-8, 1966, but again without avail (Tr. of June 7-8, 1966, pp. 72-76, 78-86, 234-237). For the subsequent proceedings on this subject, see the citations to the record given at the close of our opening paragraph *supra*, in this Point VII.

One especially regrettable circumstance in connection with this refusal of Nebbia's request for an interpreter is that, apparently both the parties and the Court were unaware, until it was too late (as explained *infra*), that the new Federal Criminal Rule 28(b), which was to take effect July 1, 1966, expressly provides as follows:

> "(b) *Interpreters.* The Court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the Court may direct."

The first mention of this new Rule in the record of this case appears in the trial minutes for July 7, 1966, R. 2030-2031, which was during the summations by counsel at the end of the case, the taking of testimony having been concluded on the preceding day (R. 1947). On that day of July 7, at the conclusion of the summation to the Jury by Nebbia's counsel, the Court addressed the latter, saying (R. 2030-2031):

> "The Court: Mr. Stream, you know that Rule 28 (b) (1) of the New Criminal Rules permits the Court to designate an interpreter. This is something new

under the sun, the power that we did not have when the trial began, and I considered the advisability of having an interpreter designated by me for the close of the trial, but I notice that this morning you had a French speaking partner talking to your client and I assume that LeFranc, who is his French speaking friend and who is in jail with him would probably be able to translate the transcript, so I don't know that it would cure any error that has already occurred. I don't think it would, but I'm ready to extend that courtesy if you want it.

Mr. Stream: I do believe, your Honor, and I'm grateful for the opportunity, that if error there has been it is too late to be corrected and so far as the summation is concerned I will see to it that it is properly translated and given to my client. Thank you for the offer.

The Court: All right."

The following day, July 8, the Court placed on the record a statement that he and Nebbia's counsel had agreed on the preceding day that to give Nebbia an interpreter at that late stage "would not cure any error, if error had indeed been committed, through the absence of a simultaneous interpreter provided by the Court * * * " (R. 2174-2175).

When the Court said on July 7, as above quoted, that "This is something new under the sun" [referring to the new Rule 28(b)], the Court was over-simplifying things quite a bit. As long ago as March 31, 1964, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States had issued its "Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts"; this had been published in 34 F.R.D. 411 *et seq.*, the bound

volume of said Volume 34 having appeared in 1964; the proposed new Rule 28(b) appeared at 34 F.R.D. 411.* In fact, as long ago as December 15, 1962 the Committee had issued its first "Preliminary Draft" which was published in 31 F.R.D. 665 *et seq.* (1962-1963), and the present new Rule 28(b) was already contained in that first draft** at 31 F.R.D. 29. Then, again, in March 1966, there appeared, in pamphlet edition, Volume 39, No. 1 of Federal Rules Decisions, which printed the proposed amendments as transmitted to Congress February 28, 1966, and printed also the final amended rules themselves (39 F.R.D. 69, 168, 189 (the proposed Rule 28(b)), 252, 261-262 (the final new Rule 28(b) as adopted).***

This new Rule 28(b), then, was far from being "something new under the sun" during all the times pertinent in this trial. We realize, as above said, that defense counsel, and not only the Court as well as the Government, failed to bring up the subject of this new Rule 28(b) earlier in the proceedings. But we respectfully do not think that any proper impingement of any doctrine of waiver, or of some reversed form of the doctrine of "ignorance of the law", should preclude Nebbia from urging the points which we shall suggest *infra* in regard to the question of how the new Rule 28(b) could and should justly have been applied in Nebbia's favor if the situation had been known earlier by Court and counsel.

There are two ways, we respectfully suggest, in which the new Rule 28(b) could and should have operated for Nebbia's benefit.

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* With a slight difference of language not here significant.

** See preceding footnote.

*** The earlier drafts contained slight verbal differences as to defrayal of expense, not here pertinent.

First, in view of the Trial Court's expressions (noted *supra*) as to having been unable to find any guiding authority bearing upon the subject of our request for appointment of an interpreter, we suggest that if the Trial Court had wished to do so it could have invoked Rule 28(b) even prior to its effective date (July 1, 1966) as denoting a policy or principle favoring the granting of such request in the exercise of an inherent jurisdiction or discretion of the Federal District Courts; in other words the Trial Court could have ruled, with entire propriety, we submit, that the new Rule 28(b) represented a "codification" of established principle, custom or authority; or at least that it expressed a "codification" of a pre-existing better or fairer practice as a matter of discretion; or at the very least that it expressed a codification of *one* permitted discretionary alternative on the part of the Federal District Judges. The authorities cited *infra* support, we believe, these suggestions.

Second, and we believe more important, the provision which appears as paragraph no. 2 at the conclusion of this Court's order promulgating the new criminal rules (39 F.R.D. 252, at 271), i.e., the effective date provision, reads as follows:

> "2. That the foregoing amendments and additions to the Rules of Criminal Procedure shall take effect on July 1, 1966, and shall govern all criminal proceedings thereafter commenced *and so far as just and practicable all proceedings then pending.*" (Emphasis added.)

As above noted, Judge Palmieri was first requested at pretrial to appoint an interpreter for Nebbia on April 27, 1966; and the pretrial request was repeated May 18, June

7-8, and during the trial, which ran *from June 15 to July 11, 1966.* The indictment in this case was filed January 5, 1966 (1a). Unusually laborious and necessarily lengthy pretrial proceedings were necessary in this case, as a glance at the docket entries (1a *et seq.*) and at the Index to the Record On Appeal in the certified record herein reveals. During the pretrial proceedings hereinbefore cited the Court was emphatic and insistent in urging upon counsel that the trial must commence without any delay beyond June 15, 1966 (e.g., Tr. of May 18, 1966, pp. 45-54; Tr. of June 7-8, 1966, pp. 276-279). In other words, there were perfectly legitimate reasons why the commencement of the trial did not precede June 15, 1966, and the setting of the latter commencement date was an act of insistent expedition on the part of the Trial Court itself, but, we emphasize, this expediting of the trial does not appear to have been required for any particular reason of which we are aware, and surely not for any overwhelming or irresistible reason. What we are driving at in mentioning these dates and their surrounding circumstances is, that if the Trial Court had taken into consideration the above italicized final clause of the effective date provision of the new Criminal Rules, the Court would have been well advised to do one of the following two things: (1) The Court may well have determined that it was wisest to defer the trial for a period of just two more weeks so that, with the trial commencing on or after July 1, 1966, the Court's own expressed doubts, uncertainties or qualms about its authority to supply an interpreter (which, as seen, the Court had at first spontaneously thought it ought to do), could have been obviated by this simple expedient of putting off the trial for just another two weeks (or sixteen days to be exact). Or, (2) the Court could have invoked the above quoted last clause of the

effective date provision of the new Rules by declaring on the record that this trial which was set to commence June 15, 1966, was predictably expected (as was realistically true, beyond dispute we believe) to extend at least until July 1, 1966; and that therefore this trial, as of July 1, 1966, was predictably going to be "a proceeding then pending" (the language of the above quoted last clause of the effective date provision of the new Rules); and that therefore in the Court's discretion it was deemed just and wise to treat this trial as predictably being a trial which would be "then pending" on July 1, 1966; and that the Court, prior to July 1, would therefore direct the appointment of an interpreter with express provision that the compensation arrangements for such interpreter would be made formal and final on or after July 1, 1966, or prior to that date if the Government consented thereto. Indeed there are numerous alternatives, or permutations or combinations, which the Trial Court could properly have employed for this purpose of granting to Nebbia the benefit of the last clause of the effective date provision of the new Rules. For example, the Trial Court could have asked Nebbia's counsel whether, in the event that ultimately a retrospective *"nunc pro tunc"* application of the new Rule should be judicially disapproved, Nebbia would then consent to assuming a properly allocated or *pro tanto* expense for any interpreter services preceding July 1, 1966. Or, the Court could have *required* both Nebbia and the Government to abide the eventual judicial outcome as to who should pay for the services of a Court-appointed interpreter for any particular number of days preceding July 1, 1966. There was, in short, some way, there *had to be* some way, of justly and properly providing Nebbia with a Court-appointed in-

terpreter for the days of this trial which so nearly preceded July 1, 1966. And, we respectfully urge, it is not Nebbia's fault that some such way was not found. We intend no facetiousness when we say that the maxim "Ignorance of the law is no excuse" is applicable to the Trial Court's actions in this case in having refused Nebbia the services of a Court-appointed interpreter.

As earlier said, it is undisputed that Nebbia does not understand the English language. He sat through this trial, in effect, as a deaf mute—except for such incomplete translation assistance as he may have sporadically received from French-speaking colleagues of defense counsel who were obviously in no position to afford Nebbia anything approaching simultaneous translation, and who (we can categorically assure this Court) did not afford Nebbia any such service of simultaneous translation. In effect, Nebbia was not only denied *any* effective confrontation with the witnesses against him, as well as effective assistance of counsel, he was even denied for all practical purposes the cardinal constitutional right of being "present" at his own trial owing to the language barrier.

(Incidentally, Nebbia's own inability to participate effectively in the trial must be presumed to have prejudiced also his co-defendants in this single-count *conspiracy* prosecution, through disenabling Nebbia to contribute any observations or suggestions for the defense of himself (and thereby of the alleged co-conspirators-defendants).)

What of the "case law" on the subject of a criminal defendant's right to have a court-appointed interpreter? Here again, unfortunately, it appears that neither the Trial Court nor counsel for either side was apparently aware that

there existed an appreciable amount of pertinent "case law" on the subject, in the conveniently available form of an A.L.R. Annotation—140 A.L.R. 766 (*"Right Of Accused To Have Evidence Interpreted To Him"*); with which see also 172 A.L.R. 923 (*"Use of Interpreter In Court Proceedings"*). The annotation in 140 A.L.R. 766, *supra*, was prompted by *State* (*Utah*) v. *Vasquez*, 121 P.2d 903 (S. Ct. Utah, 1942), which appears to be the leading American authority on the subject. The defendant Vasquez was on trial for murder, he spoke Spanish and what some witnesses described as broken English, his counsel spoke English and did not understand Spanish, and a request for an interpreter was refused. In reversing the conviction, the Supreme Court of Utah said, "If the defendant cannot understand what the witness is relating, from some points of view it is analogous to his being out of hearing". The Court also said (121 P.2d at p. 906):

> "As has heretofore been stated, the right of confrontation, in a constitutional or bill of rights sense, is more than the dictionary definition, viz., to meet face to face. A trial is more than a meeting of a defendant by witnesses face to face and silently. The confrontation is the meeting of the proof or evidence as understood by the interested parties according to their understanding.
>
> It is important that the trial court in the exercise of its discretion as to the necessity of an interpreter, either for the defendant or for a witness, be fully advised. It is far better to err by traveling a longer road or taking more time than to err by depriving one of a fair trial for want of understanding or comprehension of what is taking place. This is especially so where a human right is at stake. The purpose of a criminal proceeding is not to convict but to deter-

> mine innocence or guilt. Such having once been determined by a fair trial, what follows is an administrative matter.
>
> We concur in the statement in the case of Escobar v. State, 30 Ariz., 159, 245 P. 356, and cases therein cited, to the effect that 'it is the fairer and better way for the court, either of its own motion in a capital case or upon request in one of a lesser degree, to provide such an interpreter, and, if in any such case, the record indicates a failure to provide an interpreter has in any manner hampered the defendant in presenting his case to the jury, we shall hold a fair and impartial trial has been denied him.' ''

We invite attention to the entirety of the above mentioned annotation in 140 A.L.R. 766, where additional pertinent authorities are collected. See also *Garcia* v. *State,* 210 S.W. 2d 574 (Tex. Crim. App. 1948), another murder case, where the conviction was reversed for refusal of the trial court to supply an interpreter for a defendant who did not speak or understand the English language, as having amounted to a denial of constitutional right. In *ex parte Cannis,* 173 P. 2d 586 (Okla. Crim. App. 1946), a rape case, the conviction was reversed on the ground of denial of "a fair and impartial trial" in that, *inter alia,* the accused had a limited knowledge of English and an interpreter was not appointed.

(The above mentioned murder cases are analogous here where Nebbia, a man past the age of 50, was facing what amounts to a lifetime sentence, and in fact received what in all likelihood will prove a lifetime sentence, twenty years.)

The Federal case law is, admittedly, less directly instructive than the above mentioned State cases (including those treated in 140 A.L.R. which we have not specifically re-

ferred to). However, the principle seems recognized in the Federal Courts, that on the basis of an operating though not necessarily articulated constitutional *assumption*, an accused is entitled to a court appointed interpreter in appropriate cases. E.g., *Perovich* v. *United States*, 205 U.S. 86, 91; *Hardin* v. *United States*, 324 F. 2d 553, 554-555 (C.A. 5, 1963); *Suarez* v. *United States*, 309 F. 2d 709, 712 (C.A. 5 1962); *Gonzales* v. *United States*, 314 F. 2d 750, 752 (C.A. 9, 1963).

We also respectfully repeat our earlier suggestion that the adoption of the new Rule 28(b) denotes a recognition of the constitutional justness of providing such interpreter services in Federal criminal proceedings.

The Court below rejected argument along the above lines by appellants; the rejection was on the grounds that Nebbia was not indigent, that *some* French-English help was assumed to be available through colleagues of defense counsel and that Nebbia's lawyer had done a good and vigorous job in the trial (Pet. Cert., App. A, pp. 25a-30a).

POINT VIII*

Petitioner Nebbia was denied a fair trial by the Court's instruction to the Jury, concerning alleged identification of Nebbia's voice in the tape recordings, which amounted to direction of a verdict on this crucial issue and prejudicially suggested that the tapes were of satisfactory acoustic quality.

In charging the Jury on the important point of the alleged identification of Nebbia's voice in the tape recordings, the Court said (66a):

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* This Point VIII, like our Point III, *supra* is relevant to the retroactivity issue as touching the "integrity of the fact-finding process."

"I think the evidence is pretty clear that the room in which the conversations took place was registered in the name of the defendant Nebbia. That much I don't think has been the subject of much controversy. Of course, you have to be convinced of it. You find the facts. I don't. But I think that that part of it is pretty clear. And the one voice that remained the same, speaking fluent French, has been identified as Nebbia's voice, and I don't think you should have too much trouble finding that one of the voice's was Nebbia's. But there again it is up to you to make that determination."

When defense counsel excepted to the above charge (115a-116a) the Court stated that it would supplement the instruction (*ibid*):

"Mr. Stream: * * * I take exception, respectfully, to your Honor's reference to Nebbia and your Honor's statement that, to paraphrase your Honor, the jury should not find it to be too much trouble in concluding that one of the two voices during the Nebbia and Desist conversation was Nebbia.

I believe that the identification of those two persons goes to the crux of our case, talking about Nebbia.

We don't for one minute concede that the voices are and that the tapes are tapes of the voices of Nebbia, Desist or LeFranc.

The Court: You suggested one French voice was Kiere. I never heard you say in your summation that the other voice was not Nebbia.

What contention did you make on your summation?

Mr. Stream: I contended in my summation, your Honor, that there was no proof of identification by voices by Kiere, because he had to depend upon Smith, and there was no identification of either De-

sist, Nebbia or LeFranc by Smith because he was depending upon Kiere. So that there was a complete failure of identification except on a post-surveillance basis, when later identification by them produced this retroactive identification during these conversations, and I criticize that in my requests, which have been marked for identification.

The Court: I will tell them that if I referred to anything and said that they should have no difficulty, I was certainly not trying to impinge upon their fact-finding function and that these were merely respectful suggestions, not intending in any way to detract from their responsibility.

I will tell them that without repeating his allusion.

Mr. Stream: Thank you."

The Court then gave a "corrective" instruction along the merely generalized lines it had proposed, making no reference expressly to the above quoted instruction concerning Nebbia; for example (121a):

> "I made a comment when I said you should not have any difficulty. When I made that comment, I was doing something that I have the privilege of doing as a Judge of this court, but I also charged you and I again charge you with all the emphasis at my command that you are the exclusive judges of the facts, not I. You will decide what is easy to determine and what is not easy to determine, and I am not to decide it.
>
> So please do not accept those suggestions as any kind of a charge or instruction that you are supposed to find certain facts in a certain way. It should not be understood, and my comments were not so intended."

In Point III, *supra*, we analyzed the items in this trial record which pertain to the issue of identification of the

voices of the alleged participants in the taped conversations, as part of our larger argument on the poor probative quality of this evidence.

It is submitted that the above quoted instructions to the jury deprived Nebbia of a fair trial, indeed of a trial by jury. The Court of Appeals did not speak on this point in its opinion (Pet. Cert., App. A).

POINT IX

All petitioners challenge the sufficiency of the evidence.

As to petitioners Dioguardi and Sutera, this contention is supported in Points IV and V, *supra.* As to all petitioners, we respectfully refer to the recitals concerning each of them in the statement of the case, *supra.* As to Desist, we specifically refer to the item noted in Point III, *supra,* of alibi testimony by the witness Alriq and to the other defects in the Government's proof as to voice identification (Point III, *supra*). Further as to Desist, and as to LeFranc and Nebbia, we refer also to all of the probative defects in the electronic evidence as described in Point III. As to LeFranc and Nebbia we refer also, specifically, to the voice identification matters presented in Points III and VIII, *supra.* Further as to LeFranc, we refer to the incredibility of the proof concerning the alleged conversations with Dioguardi and Sutera at the Adano Restaurant, as treated in Points IV and V, *supra;* and to the deposition proofs by Messieurs Calle and Feischoz, supporting LeFranc's contention that his presence in this country was in connection with activities of a patriotic French-Algerian organization, not for nar-

cotics activities. And as to all of the petitioners we rely on the combination of all of the foregoing indicia of insufficiency of proof of the single conspiracy charged in the indictment.

CONCLUSION

It is respectfully submitted that the judgment or judgments appealed from should be reversed and vacated, and the indictment dismissed; or that the case should be remanded for further appropriate hearing as to unconstitutional or illegal electronic monitoring.

Respectfully submitted,

ABRAHAM GLASSER

DAVID M. MARKOWITZ
Attorneys for Petitioners Dioguardi and Sutera

ARNOLD STREAM
Attorney for Petitioner Nebbia

IRVING YOUNGER
Attorney for Petitioner Desist

JEAN CLAUDE LEFRANC
Petitioner Pro Se

ABRAHAM GLASSER
Of Counsel

APPENDICES TO JOINT BRIEF FOR PETITIONERS

APPENDIX A

Relevant Statutes

Title 21 United States Code:

§173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19,

or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

§ 174. Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and in addition may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient

evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

F.R.C.P. RULE 28(b)

> "(b) *Interpreters.* The Court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the Court may direct."

APPENDIX B

Affidavit of Electronic Consultant, Bernard B. Spindel, Filed in Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 30849

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC, JEAN NEBBIA and ANTHONY SUTERA,

Defendants-Appellants.

STATE OF NEW YORK. }
COUNTY OF NEW YORK } ss.:

BERNARD B. SPINDEL, being duly sworn, deposes and says:

I am an expert in the field of electronic sound detection, transmission and recording. I have qualified as such expert in numerous judicial, legislative and other official proceedings in various jurisdictions. I reside and have my business at Ludingtonville Road, Holmes, N. Y. 12531. I have been engaged by the attorneys for all of the above named appellants except Desist, as electronics consultant for the

purpose of these appeals and of collateral proceedings which the attorneys advise me they are contemplating. The attorneys have also advised me that, although Desist's attorney is not participating in the retainer arrangements for the engaging of my services, as a courtesy to Desist and the latter's attorney any advice and findings which they may receive from me will be made available to Desist's attorneys.

I make this affidavit in support of the application of the appellants for permission to have me listen to the electronic tape recordings which were used in evidence in this trial or which produced evidentiary leads, or which were used in order to process filtered re-recordings.

Appellants' attorneys—hereinaffer when I refer to appellants' attorneys I shall be referring specifically to Messrs. Stream and Glasser, with whom my direct contacts in this case have been had—have told me that the reason they want me to listen to these tapes is in order to enable me to advise them whether a playing of the tapes may indicate to me as an expert that the electronic eavesdrop installation was actually done in the manner testified to by the Government's witnesses, or whether instead the installation must have been done in some manner necessitating a penetration or trespass into the roomspace which was being electronically "bugged". After my initial consultations with Messrs. Stream and Glasser, in which I was shown the agents' testimony as to the eavesdrop installation, I introduced the suggestion that permission should be requested to allow me to listen to the tapes for the above purposes; and, as just

indicated, the attorneys adopted the suggestion and are accordingly making this application.

In order to explain why my listening to these tapes is expected to reveal whether or not the eavesdropping was done in the manner claimed by the Government, it is necessary for me to present certain preliminary facts concerning this installation which have been brought to my attention:—

In a proceeding on May 4, 1966 presided over by Judge Palmieri, with the attorneys for the parties present, at Room 1600 of the Waldorf-Astoria Hotel in New York City, being the room occupied by the agents in connection with the electronic bugging of the adjoining room occupied by appellant Nebbia in December 1965 (Room 1602), Agent Durham reconstructed the eavesdropping equipment in what was represented as being exactly the same way as had been done at the time of the eavesdropping.

Agent Durham described the equipment as consisting of "a dynamic microphone made by Shure Brothers, known as a Model MC-11-J. It has an impedance of approximately 1700 ohms, and is matched precisely with this Concord Model No. 330 tape recorder and an amplifier that I personally had assembled here."

I pause at this point to note that particular attention should be concentrated on Agent Durham's above mention of "an amplifier" which was in addition to the microphone and the tape recorder. It will become clear, as I proceed, why I am directing attention to this additional amplifier item.

Agent Durham went on to explain that the amplifier would act as a "pre-amplifier" to boost the power of the tape recorder when the eavesdropped sound signals dropped to a volume level too low to record normally on this particular tape recorder. Appellants' attorneys have also shown me testimony by Agent Durham, and by the agent who actually operated the eavesdropping equipment (Agent Kiere) after it was installed by Agent Durham, in which both of those agents apparently indicate in an unmistakable way that this amplifier or pre-amplifier was not intended to be used and was not actually used on a constant or continual basis, but apparently it had to be shut off from time to time "so that you don't overload the entire circuit" and produce "a feedback effect with a high piercing screech".* For the reasons which I shall shortly mention, it may be stated as an incontrovertible scientific or technological fact that the installation described by Agent Durham could not have worked at all except with continual, uninterrupted use of the pre-amplifier.

The next item which I am now to mention is also of quite possibly decisive importance, for the purposes of a scientifically or technologically valid answer to the question of whether the installation could have been made and could have worked in the manner testified to by the agents. I refer to the further testimony, by Agents Durham and Kiere, that the installation was also equipped with what is known as a voice actuated function; this is a device for

* I am advised that in Mr. Stream's affidavit herein reference is made to the pages of appellants' printed appeal briefs where all of the agents' testimony which I am here quoting or describing is cited.

automatically "triggering" the listening installation when a certain sound level is reached. The importance of this fact, for the purposes here involved, is that this automatic "triggering" voice-actuated device would start the tape recorder going when the requisite sound level was reached in the agents' own room at the Waldorf-Astoria, and not only when that sound level was reached in the room that was being bugged; in fact the voice actuation function would be even more sensitively triggered by noises in the agents' own room than by noises in the room being bugged, if in fact the microphone installation was inside the agents' room as they testified rather than being located (penetrationally or otherwise) in the adjoining room. So that, if the testimony shows that significant sound-producing activity was occurring in the agents' room, and if in turn such sounds do not appear on the tapes, there would immediately arise at the very least a strong suspicion that the microphone could not have been located inside the agents' room as they have testified was the case. And in fact the record reveals that there was in the agents' room very significant sound-producing activity indeed, including extensive use of a typewriter, likewise extensive use of a two-way radio which was operated at a very loud volume, and other activity. Mr. Stream, who I am told has heard these tapes played during the trial, advises me that they do not reveal such sounds of typewriter, radio, etc., and that while they do contain extraneous noises, such consists of street traffic noises, an occasional extraneous voice noise, and the like.

With the above items in mind as to the technological character of the apparatus used according to the agents' testimony, I now respectfully invite attention to one fur-

ther feature as to the physical way in which the microphone portion of the apparatus was said to have been installed. The agents testified that the microphone was attached by tape to the bottom of a door between rooms 1600 (the agents' room) and 1602 (Nebbia's room), i.e., it was attached in such manner as to be physically located entirely within the room space of the agents' room; further, that between the bottom of said door and the floor there was an aperture of about ⅜ of an inch, the microphone being tilted at an angle of about 45 degrees from the door towards the floor so as to cup sounds received through the ⅜" aperture; that a towel was kept draped over the microphone to muffle sounds coming from directions other than the ⅜" aperture; and that the wire from the microphone led to the amplifying and recording equipment which in turn was located in the bathroom of the agents' room. The testimony further states that Agent Durham claims to have installed the microphone in this manner without having first ascertained just what was the physical situation beyond the ⅜" aperture at the bottom of the agents' own door. This last is important because, concededly, the door arrangement between the agents' and Nebbia's room was a double-door arrangement with a narrow airspace in between; and Agent Durham, the installing expert, has sworn that, aside from having been told (merely as a general fact, apparently) by Agent Kiere that it was a double-door arrangement, he had no other knowledge of any of the physical circumstances

whatever as to this double-door arrangement.* Agent Durham did not even know whether Agent Kiere's knowledge about the existence of a double door was based on the latter's having opened the agents' door to look at the setup; Agent Durham had seen no plans or drawings that would reveal the setup of the double door; he had not looked through the small airspace at the bottom of the door opening into the agents' own room; he had not even examined "that space at all"; he did not "check to see if that airspace was clear to the next room", nor even had anybody told him whether it was; except by his judgment based on the performance of the equipment, "there could have been a solid wall on the other side of that with no airspace, as far as [he] knew"; nor did he know the thickness of the door to which he swore he attached the microphone, or the thickness of the space between the double doors, nor had anyone informed him as to these items; and he had installed the equipment "right there" without testing it beforehand to see whether it would record sounds coming from the other room.

As an expert in this field I respectfully aver that it is incredible to me that any other qualified expert in this field would go about making an installation of this type on the basis of the lack of knowledge of the physcial setup as stated by Agent Durham. I am informed by Mr. Stream

* I am informed by Mr. Stream that in the brief of appellant Nebbia in this appeal, pp. 26-27, Agent Durham's testimony is shown to have been apparently evasive, at first, even as to the question of whether he knew at all, when he installed the microphone in the manner claimed, that there was a double-door at all rather than a single door.

that the appellants contend that, partly on the basis of this expert opinion of mine, together with other circumstances which I am informed are set forth at pages 9-37 of Nebbia's brief and at pages 5-8 of the Dioguardi-Sutera brief in these appeals, the appellants are entitled to request a further judicial exploration of the question of how the bugging of Nebbia's room was actually done—that is, whether it was done in the way the agents state, or by a penetrational or otherwise "trespassory" invasion of Nebbia's roomspace.

Before I come, finally, to my averment of the technological reasons why my hearing of the tapes could produce objective scientific indications as to the way in which the bugging of Nebbia's room was actually carried out, I would respectfully touch upon the following further areas of factual detail in regard to items which I have previously mentioned in a more general way:—

First, as to Agent Durham's above noted description of the technical specifications of the units used in the eavesdropping apparatus, it will be recalled that Mr. Durham said he used a "dynamic microphone made by Shure Brothers, known as a Model MC-11-J", and that this unit has "an impedance of approximately 1700 ohms, and is matched precisely with this Concord Model No. 330 tape recorder and an amplifier". There are several difficulties, to the mind of an expert, in these statements of Agent Durham. To begin with, the Shure Model MC-11-J does not have "an impedance of approximately 1700 ohms", which would be what is known in my field as a relatively "high" impedance, but it has an impedance of 1000 ohms (see, e.g., the standard catalogue of Harvey Radio Co. Inc. (1964),

p. 287, bottom of third (last) column, stating the specifications of the Shure Model MC-11-J). Thus, and again merely to begin with, Agent Durham's description of his MC-11-J microphone, is a description of an item which does not exist. But passing this circumstance as possibly not being decisive, and accepting that Agent Durham did in fact use an MC-11-J microphone, i.e., assuming that he did use this "low impedance" 1000 ohms microphone, it would then follow as a matter of inescapable technological necessity (as I earlier averred) that this microphone could not work at all in the overall installation described by Agent Durham unless the amplifier (or pre-amplifier) which he also described was kept in operation on a continual or constant basis, because without such pre-amplification the MC-11-J does not "match" with the "Concord Model No. 330 tape recorder", the latter being a "high impedance" unit which could not work with the "low impedance" MC-11-J except through the boosting power of a pre-amplifier. And, as seen, both Agents Durham and Kiere testified in such manner as apparently to compel the conclusion that the pre-amplifier was not used on a constant or continual basis during the times when the tape recorder was recording. From all of this the virtually inescapable inference, to me as an expert, is that the agents must have used a high impedance microphone; or, as the only possible alternative, that the agents have simply not correctly described the equipment they used or the way in which they used it, and in such latter alternative event the appellants' position would be, I am informed by Messrs. Stream and Glasser, that this very incongruity in

the agents' testimony favors an expert audition of the tapes to probe into what may actually have been done.* Pursuing one step further my above theme that indicatedly the agents must have used, by virtually inescapable inference, a high impedance microphone, I must respectfully add this, that there does not exist any such high impedance microphone of anywhere near the small physical size of the MC-11-J type depicted by the agents as having been used in the kind of door-taped installation here involved; and the only extant kinds of high impedance microphones which could have accomplished the eavesdropping job here claimed to have been done would have had to be of the "spike mike" type—or some type of "bug" located inside Nebbia's room.

Second, there is the problem of the narrow airspace between the two doors. I am informed by Messrs. Stream and Glasser that, based on our consultative discussions heretofore, they have presented, at pp. 5-8 of the Dioguardi-Sutera brief and at pp. 9-37 of the Nebbia brief in these appeals, some discussion of the technological facts of the so-called "parabolic mike". I have advised Messrs. Stream and Glasser that, given the kind of angle-tilted microphone installation at a double-door arrangement of the type here involved, in other words taking it to be the fact that the eavesdropping was done in the manner stated by the Government, such eavesdropping was done by the method of a "parabolic mike". This suggestion of mine that the installa-

* I here respectfully interject that when I thus refer from time to time in this affidavit to appellants' positions or contentions deriving from the technological aspects of the situation, I am of course denoting that such has evolved out of the technical consultative discussions between appellants' attorneys and me.

tion (as claimed by the Government) was of the "parabolic mike" type, is based on the following objective technological considerations:— The narrow airspace between the two doors constituted, under the circumstances here involved, what we electronic technicians call a "sound chamber". Sounds coming from Nebbia's room would not merely go through a small aperture at the bottom of Nebbia's own door (if there was any such aperture, which Agent Durham, as seen, said he never ascertained in any event), but, much more important, such sounds from Nebbia's room would vibrate against his own door to be thence vibrationally transmitted into the narrow intervening airspace between the two doors (what I have termed a "sound chamber"), whence those now sound-chamberized sounds would be picked up (theoretically, if the Government's description of its installation is correct) by the tilted microphone at the bottom of the agents' door. The angularly rebounding or multiply resounding acoustical process through which these sounds would pass inside the narrow airspace or "sound chamber" between the two doors, combined with the sound-receiving function of the tilted microphone, would result, in short, in a classic instance of the functioning known as the "parabolic mike". My point in going into this quite technical phase of the matter is not, in this present affidavit, to establish that a technical "trespass" thereby did in fact take place or must have taken place (on the Government's own theory of how it bugged Nebbia's room) because this latter is to be taken up by appellants' attorneys, they informed me, in connection with a subsequent more comprehensive application that they are planning to make to this

Court and to the Department of Justice based on the technological circumstances of an invasion of Nebbia's privacy-designed rights in the double-door arrangement with its intervening air cushion; that is, I am not endeavoring in this affidavit to address myself to the ultimate conclusion of whether in fact this electronic invasion of what was intended as a privacy barrier was converted into a privacy-invasion instrumentality through the technology of this "parabolic mike". What I am addressing myself to in this regard is the narrower, presently more pertinent question of whether, by my hearing the tape played, I would be able to make an expert detection that the sounds recorded on the tapes reveal a "parabolic mike" type of recordation (and microphonic reception) in the manner above suggested. If such should be revealed by my hearing of the tapes, appellants' attorneys would be to that extent in a more informed position to urge their contention of "trespass" by reason of the use of a "parabolic mike".

Third, in connection with the door-taped and angle-tilted method in which the MC-11-J microphone is stated by the Government to have been used, I would now respectfully add the following:—This was concededly what is known as a "multi-directional" microphone. That is, the microphone would pick up sounds originating in the agents' room, and not only sounds originating in Nebbia's room; this has been previously mentioned, but I am now respectfully inviting attention more specifically to the "multi-directional" feature which underscores the point as to the picking up of sounds from the agents' room. As also previously noted, those sounds from the agents' room were very significant

ones indeed; and if those sounds are not present, in reasonable commensurateness with the quantum of their actual occurrence as testified to by the agents (the typewriter sounds, the radio sounds, etc. previously herein mentioned), then, bearing in mind the "multi-directional" functioning of the microphone said to have been used—and notwithstanding, I may categorically state, the attempted muffling of the microphone by draping a towel around it, this being quite ineffectual to muffle the essential multi-directional reception of this type of microphone—such absence of those agents'-room-originating sounds from the tapes would of necessity point to the strong probability that no such multi-directional microphone could actually have been located in the agents' own room.

I may now turn to the final specific technological details of the procedure which appellants' attorneys and I contemplate in the event the within application to allow me to listen to the tapes should be granted. There is an instrument employed by expert practitioners in my field known as the electronic oscilloscope, which, when used in auditing electronic tape recordings of the present type, can detect electrical or magnetic impulses on the tapes which are not visible to the eye of a person visually examining the tapes or to the unaided ear of the listener. The oscilloscope can reveal signals which cannot be detected by any other means. The results revealed by the oscilloscope to a trained user of that instrument, combined with the trained auditory abilities of an expert like myself utilizing the experienced alertness of his ear and his mind in carrying out both the oscillograph procedure and the conventional listening procedure, can

enable such a trained listener to perceive on the basis of a detailed demonstrable electronic and auditory analysis (which of course could be formulated in the form of sworn testimony referring to all of the relevant technological items) significant indications as to the actual nature of the eavesdropping installation used.

The above described procedure for having me listen to the tapes, as desired by appellants' attorneys, would enable me also as an expert to detect any erasures, splicings or other tampering with the tapes. I am advised by Messrs. Stream and Glasser that, while detection of such last mentioned possibilities is not their primary object in making the present application for allowing me to listen to the tapes, such is one of their objects as a part of their overall contemplated procedure in connection with any collateral proceedings before the Department of Justice in Washington, D. C., which may be appropriate by reason of what I am informed those gentlemen have referred to in their appeal briefs herein as the new "Schipani" electronic eavesdrop administrative review program. More specifically, Mr. Glasser in particular has informed me that, in connection with appellants' contention in the brief of LeFranc that the tapes are pervasively inaudible and unintelligible, and that the admitted re-processing of the Nebbia-Desist tape to filter out background noises presents additional questions of authenticity and genuineness of that tape and perhaps of the entire eavesdropping activity, appellants' attorneys are definitely desirous at this time of having my opinion on the questions mentioned in this paragraph; and that for this purpose they desire to have me listen to the tapes.

In conclusion, I realize full well how important it is that I address myself in the most specific way to the question of whether the procedure above proposed for my listening to the tapes might damage the tapes in point of their future evidentiary use. I have discussed this problem in the most careful and thorough way with Messrs. Stream and Glasser, and they have authorized me to assure the Court and the Government that, in the first place, the appellants are willing that the following be done:— Before any playing of the tapes for my audition, the Government, using apparatus of its own selection, may run off, in the presence of appellants' counsel (with myself present as their electronic consultant), one or more copies or duplicates of the original tapes; such copies or duplicates would then be played back so that all interested parties may agree on the fidelity of such copies or duplicates (and appellants would interpose no obstructive or otherwise unreasonable opposition on such question of the fidelity of the copies); appellants would then stipulate (so their counsel inform me) that, in the event of any good faith claim by the Government in the future that damage occurred to the original tapes in the course of their having been played for my listening, the above mentioned copy or copies of the tapes would be admissible for evidentiary use in lieu of any such damaged original. However, I must also respectfully inform the Court that there is actually no realistic chance that the original tapes could sustain any damage whatever from the listening procedures which the appellants are herein requesting. Neither the oscilloscope procedure nor the general listening procedure above outlined presents any danger of damage to the tapes; only some completely unanticipated

and altogether unlikely mishap could hurt these tapes upon their being replayed in the manner herein proposed; and that danger is no more than the normal danger which is intrinsically present in any re-play procedure. With the meticulous care that may be expected from the Government's personnel, and with the comparable expert care which I assure the Court I shall myself observe, the occurring of any damage to these tapes if they are re-played as herein requested is an altogether negligible possibility.

BERNARD B. SPINDEL
Bernard B. Spindel

Sworn and Subscribed to
before me this 3rd
day of January, 1967.

MILTON C. WINKLER
Milton C. Winkler
Notary Public, State of New York
No. 31-9704765
Qualified in New York County
Commission Expires March 30, 1968

APPENDIX C

Letter of Appellants' Counsel, Abraham Glasser, to Clerk of Court of Appeals, May 1, 1967, *Re* Electronic Eavesdropping

ABRAHAM GLASSER
52 Eighth Avenue
New York, N. Y. 10014
May 1, 1967

HONORABLE A. DANIEL FUSARO, *Clerk*
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURT HOUSE
Foley Square
New York, N. Y. 10007

Re: U.S.A. v. Samuel Desist, et al.
Docket No. 30849

DEAR MR. FUSARO:

On April 28, 1967 I wrote to you, on behalf of counsel for all appellants in the above case, that we would send to you not later than May 2, 1967 a further letter for the attention of the Panel relating to United States Attorney Morgenthau's letter of April 27, 1967.

Mr. Morgenthau's last-mentioned letter states, in essence, (a) that the present Department of Justice policy as to electronic monitoring is that the Department's "duty to disclose turns on whether something that is arguably ma-

terial has been discovered''—apparently the United States Attorney thereby is suggesting that disclosures made in the April 27 letter did not need to be made previously; (b) that no trespass was committed in the monitoring of appellant Nebbia's Waldorf-Astoria Hotel room in December 1965; and (c) that two additional instances of electronic monitoring occurred.

Each of the above three items or topics in Mr. Morgenthau's April 27 letter calls for comment, but before presenting comments it will be convenient to review some of the background of the situation in which the April 27 letter (*supra*) is the latest development.

(Except as the context will otherwise indicate, the following background recitals are based on papers previously filed by us in these appeals or in the supplementary ''Schipani'' motion proceeding.)

The pertinent chronology begins with a pre-trial session on April 27, 1966 before Judge Palmieri (R.3151-3205; Nebbia Brief, p. 21). On that occasion the Government announced that there had been electronic eavesdropping—later identified as the Waldorf-Astoria incident. Judge Palmieri then suggested (still at the pre-trial hearing of April 27, 1966) that ''I think the first order of business would be a precise and complete reproduction of the eavesdropping technique and method'' (R.3157). The following colloquy then occurred (R.3157-3161):

> ''Mr. Maurice Edelbaum: That would be assuming, of course, that the eavesdropping took place only in this jurisdiction. If it took place in other jurisdictions I think that might present some problems.

Appendix C—Counsel's Letter Re Electronic Eavesdropping

The Court: I will ask Mr. Tendy.

Mr. Tendy: The only eavesdropping—I know of none that occurred outside of the Southern District of New York. There was none in Georgia, for example. There was none in Florida. There was eavesdropping resorted to here in New York City.

The Court: I take it that you had pre-trial conferences with the agents in the case and that you have seen their reports.

Mr. Tendy: I have seen their reports, yes, sir.

Mr. Maurice Edelbaum: Was there eavesdropping outside of the country?

Mr. Tendy: The only eavesdropping that I'm familiar with occurred right here in this district.

The Court: When you say "this district," you mean Manhattan?

Mr. Tendy: Yes, it occurred only in Manhattan. If there was something in, let's say, Brooklyn or Queens or any place else, of course I will promptly bring this to the attention of the court.

The Court: So far as you know the only eavesdropping occurred in Manhattan?

Mr. Tendy: Yes.

The Court: At one or more sites?

Mr. Tendy: Let me check with Agent Fitzgerald.

The Court: We have got to organize this expedition for observation. If there are many separate sites it may involve more than one section.

Mr. Tendy: I think there was just one resorted to, your Honor, at one site. I'm quite certain of that.

* * * * *

Mr. Philip Edelbaum: I have already served motion papers in relation to this very subject. Would there be any need of making new motion papers?

The Court: No, you need not.

Mr. Philip Edelbaum: At that time the motion was not only to suppress eavesdropping but to suppress any possible wiretapping. Mr. Tendy never stated one way or the other whether there was wiretapping.

Mr. Tendy: Let me state now there was none. When I use the term electronic listening devices I use it generically to cover anything that counsel might have in mind. I feel that is only my obligation.

Mr. Maurice Edelbaum: Specifically, you are telling us now that there was no telephone interceptions of any kind?

Mr. Tendy: No.

Mr. Maurice Edelbaum: All right, that is sufficient.

Subsequently, in the pre-trial session of June 8, 1966, pp. 259-260*, where defense counsel were examining one of the narcotic agents as to how they knew Nebbia was planning to stay at the Waldorf-Astoria, the following occurred:

"Q. Then you received this information on the 14th, that he would be possibly staying at the Waldorf-Astoria? A. Yes, sir.

Q. How did you derive that information, sir?

Mr. Tendy: Objection.

The Court: Sustained.

Q. Was that through electronic equipment?

Mr. Tendy: Objection.

The Court: Sustained.

Mr. P. Edelbaum: Your Honor, on Mr. Jones' question, I think we are entitled to know if there

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* In further referring to the pre-trial eavesdrop proceedings we shall use the original stenographic page numbers except for the session of April 27, 1966 above mentioned.

is any other electronic eavesdropping in this case other than the one Mr. Tendy stated there was.

The Court: You have already gotten that. It was a formal representation in one of the first pretrial sessions we had in the case. I remember distinctly that Mr. Tendy made a formal representation to the effect that the only use of electronic equipment was this and that he would make full disclosure of it.

Is that correct, Mr. Tendy?

Mr. Tendy: That is correct, your Honor.

Mr. P. Edelbaum: I realize that, your Honor, but there have been other things that were brought out and Mr. Tendy stated that certain things, like some magazine articles, he wasn't aware of. Maybe there was electronic eavesdropping that this agent is aware of—

The Court: If we are going to do that we might as well go over to 90 Church Street, question every doorman, every stenographer, every charwoman, every agent in the Bureau and we may get to trial in this case several years from now.

Here is a responsible representative of the government who states that there was no use of any electronic equipment other than this eavesdropping equipment and that he was making full disclosure of all the electronic equipment that was involved in this case."

The pertinent chronology now skips over the entire trial and all other proceedings down to the eve of the perfecting of the within appeals—for throughout all that time defense counsel had been proceeding on the Government's assurance, as above quoted, that there had been no other elec-

tronic monitoring. The briefs of several of the appellants in these appeals, filed in December 1966, re-opened the question of the acceptability of the Government's factual description of the Waldorf-Astoria monitoring techniques (Nebbia Br. pp. 9-37; Dioguardi and Sutera Br. pp. 5-8). Likewise in those briefs, and in supplementary motion papers for appellants filed, respectively, on January 4 and 10, 1967—prior to oral argument of these appeals, which was held January 19, 1967—we requested "Schipani"-type review on a *de novo* and comprehensive basis to find out what the Government had actually done by way of electronic monitoring in this case; we of course did not expressly contend, as we were not then in a position to do so, that additional monitoring had occurred, but we did suggest the possibility and requested further inquiry on the Government's part (Nebbia Br., p. 21, 4th fn.; "Affidavit In Support Of Motion For Supervisory Orders *Re* Electronic Eavesdropping Issues, Etc.", sworn to by Abraham Glasser January 10, 1967, p. 11, par. K).

Neither in the Government's printed brief herein, filed shortly before the oral argument of January 19, 1967, nor in its affidavits of January 5 and January 19, 1967, nor in its oral argument on January 19, nor in its letter to the Panel dated February 15, 1967, was mention made of any other electronic monitoring. Indeed, in the letter of February 15, 1967, the United States Attorney stated that the Schipani "review procedure was undertaken with regard to this case and no notification has been made to this Court because our inquiry has produced no information within the scope of *Schipani* v. *United States*". (We are not overlooking that, as above noted, in his latest letter of April 27,

1967, the United States Attorney is apparently suggesting that Department of Justice policy was being followed when disclosure of additional monitoring was not made in the letter of February 15, 1967; we return to that interesting suggestion late in this letter, after completion of these chronological background recitals.)

The next pertinent item, chronologically, was our "Motion For Permission To File Supplemental Statement For Appellants After Oral Argument", supported by affidavit of Abraham Glasser sworn to March 27, 1967. In that motion we asked the Court to consider whether the United States Attorney's letter of February 15, 1967 (*supra*) was a satisfactory response to the "Schipani" problems that had been posed to the Government in this case. (In our latter motion of March 27, 1967 we referred also to communications which had taken place between Mr. Glasser and the McClellan Committee concerning President Johnson's order of June 30, 1965; we shall return to this subject *infra*.)

The next pertinent development was the letter of April 18, 1967 from Mr. Fusaro to the United States Attorney requesting clarification of the United States Attorney's letter of February 15, 1967.

And the final development (until now) was the United States Attorney's above mentioned letter of April 27, 1967.

Chronologically paralleling the above summarized happenings in the present appeals has been the gradually unfolding policy of the Department of Justice in Washington in its successive presentations to the Supreme Court commencing with the *Black* case. This unfolding policy of the Department has significance here from several aspects, all

of which will be touched upon in the course of this letter, but for the moment we confine ourselves to the unfolding of the departmental policy as to the duty to disclose—the topic with which Mr. Morgenthau's latest letter herein (April 27, 1967) commences. In *Black* the Solicitor General was responding to an order of the Supreme Court to make disclosure, and apparently full disclosure was made. In *Schipani* the Solicitor General announced the important new Departmental policy of voluntary disclosure of "the instances in which there might have been monitoring affecting a case which has been brought to trial" (Supplemental Memorandum for the United States, p. 5). The precise scope of this newly announced policy of voluntary disclosure was, we admit, unclear, i.e., the Solicitor General's Supplemental Memorandum in *Schipani* did not expressly commit the Department to a self-imposed duty of plenary disclosure of any and all instances in which electronic monitoring had been done or attempted; the pertinent language in the Solicitor General's Supplemental Memorandum in *Schipani* appears at pp. 4-5 thereof, including the footnote. However, it was shortly to become clear that the Department of Justice in Washington interpreted its duty of disclosure in a plenary sense.

Thus, in the "Brief For The United States" in response to the petition for certiorari in *O'Brien and Parisi* v. *United States,* October Term 1966, No. 823, the Government's brief being dated February 1967, the Solicitor General made what we think we may fairly term plenary disclosure. We understand that this Court has copies of the O'Brien-Parisi "Brief For The United States", where the pertinent matter appears at pp. 10-12. We note that in that

Appendix C—Counsel's Letter Re Electronic Eavesdropping

Brief the Government contended that the electronic monitoring in one instance "was not mentioned in any F.B.I. report nor were its contents communicated to attorneys for the Department of Justice, including those who prosecuted this case"; that in another instance the monitoring overheard only a conversation between O'Brien and one of his attorneys relating to the territorial conditions of O'Brien's release on bail and that this conversation "was not communicated in any manner outside the F.B.I."; and that the monitoring affected only O'Brien, no conversation of Parisi being overheard, but that the Solicitor General nevertheless told the Supreme Court, "we do not oppose the same disposition of [Parisi's] case as is afforded to petitioner O'Brien" (this last appears at p. 12, fn. 5 of the Government's brief in *O'Brien-Parisi*). As this Court is aware, the Supreme Court granted certiorari, vacated the judgment, and remanded the *O'Brien-Parisi* case for a new trial should the Government seek to prosecute anew; Justices Harlan and Stewart, in dissenting, would have preferred to remand the case to the District Court "for a full hearing as to the circumstances and effect" of the electronic monitoring (35 U.S. Law Week 3329-3330; 18 L.Ed2d 94)—so far as appears, the Supreme Court's disposition of the case applied to both *O'Brien* and *Parisi*, notwithstanding Parisi's supposed lack of "standing", as to which the Solicitor General had expressly relinquished any contention, as seen.

Next, in *Granello and Levine* v. *United States*, October term 1966, No. 750, the Solicitor General again made a voluntary plenary disclosure ("Brief For The United States In Opposition", pp. 16-21). Since we understand

that this Court has copies of the Solicitor General's brief in *Granello-Levine,* we shall not here quote from that brief. The brief is dated April 1967. For the first time the Solicitor General, in *Granello-Levine,* proposed a theory for differentiating the monitoring cases on the basis of whether any attorney-client conversation was overheard. The Solicitor General also urged in *Granello-Levine,* that the monitoring had not taintingly penetrated the trial proofs. But it seems to us that the most significant point made by the Solicitor General in *Granello-Levine* was that the monitoring had related to an altogether separate case involving Levine alone (no monitoring had applied to Granello at all). Still, three Justices dissented from the denial of certiorari in *Granello-Levine* (the Chief Justice and Justices Douglas and Fortas—and Mr. Justice Brennan, whose "predictable" vote would hardly have been in doubt, disqualified himself) (35 U.S. Law Week 3376-3377, April 25, 1967). As is well known, it is a fruitless occupation to speculate on the question of why the Supreme Court denies a writ of certiorari (*Supreme Court Practice,* 3rd Ed., Stern and Gressman, pp. 179 *et seq.*). Perhaps more fruitful would be the speculation that if Justice Brennan had not disqualified himself in *Granello-Levine,** certiorari would have been granted—the convention being that certiorari is granted on the vote of four Justices. We do not wish to speak impertinently, but if the Government is trying to persuade this Court that the denial of certiorari in *Granello-Levine* "safely" portends a similar denial in the

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* The New York Times in reporting the case on April 25, 1967 stated that the reason for Justice Brennan's disqualification was that his son was of counsel for one of the petitioners.

present case (in the event of an affirmance by this Court), we respectfully suggest that the Court will doubtless wish to scrutinize for itself any such offered persuasion on the part of the Government.

With the above two-fold background in mind—i.e., the concurrent chronologies of this case and of the Solicitor General's and the Supreme Court's joint working-out (as it were) of the new Federal constitutional policy as to electronic monitoring—we may now take a closer look at the United States Attorney's letter of April 27, 1967.

First, as regards the United States Attorney's introductory remarks in that letter concerning the *Granello* case and the disclosure standard of "whether something that is arguably material has been discovered", we must respectfully point out that it is a little late for the United States Attorney to try to justify, as apparently he is trying to do, the prior non-disclosure of the additional monitoring in this case. The Solicitor General's position in *Granello-Levine* is not helpful to the United States Attorney. It is not helpful either in point of chronology or in point of substance. Chronologically, as we think was above demonstrated, the Department of Justice in Washington committed itself at least as early as February 1967, in *O'Brien-Parisi,* to plenary rather than to parsimoniously calculated disclosure. Even in *Granello-Levine,* as recently as April 1967, the Solicitor General was continuing to make such plenary disclosure. Not so, however, it seems, the Southern District of New York. We do not wish to speak unjustly. The United States Attorney has not told the Court, or us, just when he learned of the additional moni-

toring. All we know is that in his letter of February 15, 1967 he spoke, in apparently unqualified words, of the generally projected "extensive review" *a la Schipani* as having been "undertaken with regard to this case and no notification has been made to this Court because our inquiry has produced no information within the scope of *Schipani* v. *United States*"; that on March 27, 1967 we filed motion papers asking this Court to press the United States Attorney further with a view to clarification of the letter of February 15, 1967; that on April 18, 1967 Mr. Fusaro wrote to the United States Attorney requesting clarification as to "any trespass committed in connection with the monitoring in the above case"; that continuously prior thereto and since the time of the pre-trial proceedings in April-June 1966 before Judge Palmieri everyone had been assured by the United States Attorney's Office (on the basis moreover, apparently, of definitive consultation with the Narcotics Agents) that no other electronic monitoring had occurred; that in the relatively recent interim of some five months since *Schipani* the Solicitor General has been voluntarily making plenary and unstinting disclosure while in that same period the United States Attorney for the Southern District has proceeded along the lines above described; and that now at last, being brought to grips (it appears) by this Court's persistent interrogation, the Government has disclosed the two additional instances of monitoring revealed in the letter of April 27, 1967. We repeat, the explanation for the Government's tardiness of disclosure may well reside in the chronology of its own *Schipani* review investigation, that is, quite possibly, the disclosures of additional monitoring in the letter of April 27, 1967 did not come to

light at a significantly earlier date. Still, one's mind is disturbed concerning this problem when one ponders the overall evolution above described in regard to this case, and especially when one ponders the United States Attorney's opening sentence in the nature of an apparent apologia in the letter of April 27, 1967—the reference to the *Granello* case. Perhaps we have mentioned somewhere in our prior papers herein—we do not now recall—Edward Gibbon's charming understatement in the "Decline and Fall", where the author was referring to a certain medieval monkish authority, and Gibbon remarked, "A melancholy doubt obtrudes itself upon the reluctant mind". We hasten to add that, surely (and with unqualified sincerity), we are not for one moment suggesting that the United State Attorney's office for the Southern District has deliberately, or in any other sense unworthily or improperly, withheld from this Court or from the appellants disclosure of information which that office deemed "material" in law or in fact. What we are saying, rather, is that the United States Attorney's office is indicatedly revealed as having been wrong—well-meaningly wrong, we willingly state—in its whole basic thinking about this problem of disclosure. The prosecutive diligence which may have prompted this wrong thinking on the part of the United States Attorney's office is understandable; this has been, after all, probably the most horrific single case of heroin importation in recorded prosecutive history in this country, and no prosecutor worth his salt would do other than strive to the utmost by all proper means to preserve judgments of criminal conviction in such a case. But if constitutional impropriety has occurred here, as we maintain, the issue transcends the un-

disputedly high value of prosecutive *esprit de corps*. We go further, in our ungrudging acknowledgement of the ethically unassailable motivations of the United States Attorney's office. We do not doubt for one moment that the United States Attorney himself and all of his attorney staff members who have been engaged with him in this matter, have been truthful in each and every representation that they have made in these proceedings. What we question, and all that we question, is the following two things: (1) Have the Narcotics Agents lived up to their own full duty of "disclosure" to the United States Attorney's office; and (2) has the United States Attorney's office shown sound legal judgment in its interpretation of the Solicitor General's policy of "Schipani" disclosure on a plenary basis?

Second, if we are correct in the suggestions offered in the last preceding paragraph, that is, if indicatively the Narcotics Agents have fallen short of their own duty of disclosure to the United States Attorney, and if the latter official and his aids have failed in sound legal judgment as regards the proper scope of "Schipani" disclosure, then it seems to us that the following further questions must unavoidably be faced in this case:— When the United States Attorney states to this Court, as he has done in his letter of April 27, 1967, that "there was no trespass committed in the monitoring litigated at the trial and at issue on appeal", and considering (as one must) that this representation by the United States Attorney (unimpeachable though we concede it to be insofar as it comes from the United States Attorney) is of necessity based on information from the Narcotics Agents, is one not entitled to ask that the representation be judicially scrutinized *de novo* in

a proper adversary hearing where the Narcotics Agents may be questioned anew with a view to eliciting the full facts as to all of the disturbing circumstances brought forward in our briefs and in our prior motion papers herein? Why should the conclusory representation in the United States Attorney's letter of April 27, 1967 that "there was no trespass committed" be taken as being without further judicial recourse, when we all know that this conclusory assurance of the (unchallengeably honorable) United States Attorney stands or falls on the assurances which he in turn has received from the Narcotics Agents? Is it not, really, unthinkable, in all of the circumstances here presented, that a final, judicially determinative conclusion of "no trespass" should become lodged in this case without a further full-scale adversary judicial hearing in which the Narcotics Agents may be examined by defense counsel—and preceding which hearing the defense would have been given the opportunity (requested in our herein pending motions) *to have the tapes audited by our electronic consultant and to inspect the "Schipani"-review records of the Department of Justice in regard to this case*? Do not the actions taken by the Supreme Court in *Black, Schipani, O'Brien-Parisi* and (with acute division of the votes of the Justices) in *Granello-Levine*, raise the strongest kind of warning that mere representations by a United States Attorney's office *conclusorily* assuring that there has been "no trespass" will be insufficient to avert the grant of certiorari if not outright vacating of judgment, the circumstances which point to an opposite conclusion being so disturbingly substantial (again we are referring to our previous papers filed herein)?

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Third, as to the two additional instances of electronic monitoring belatedly disclosed in the United States Attorney's letter of April 27, 1967, we submit as follows:— The United States Attorney's statement that on December 18, 1965 in Columbus, Georgia, Narcotics Agents installed an electronic device in an automobile prior to its rental by Nebbia, that the device did not work and resulted in no overheard or recorded conversations, and that the United States Attorney's office had no knowledge of this installation at the time of the trial herein, is, we must again point out, evidently of a conclusory nature, and evidently also in turn based upon information given to the United States Attorney by the Narcotics Agents—that is, of course, except for the United States Attorney's last noted statement that his office had no previous knowledge thereof, which we of course do not challenge. However, the United States Attorney's letter does not state *when* his office did obtain the knowledge. Accordingly, our earlier suggestion is here applicable, to wit, that if the United States Attorney's office has been in possession of such knowledge during the herein operative "Schipani review" which has coincided with the pendency of these appeals and disclosure has been deferred until now, the questions we have posed as to the soundness of the legal judgment of the United States Attorney's office in its interpretation of its duties under the Schipani procedure may again be mentioned. But more important, are we not entitled, in view of the totality of the circumstances of this case, to ask that appropriate provision be made to afford us an effective adversary opportunity by judicial hearing to explore the issue of the allegedly abortive automobile monitoring in Georgia for which, again, the only

apparent basis of the United States Attorney's self-excusing representations derives from representations made to him by the Narcotics Agents? Should we not be afforded a full judicial opportunity to question those gentlemen of the Narcotics Bureau? The United States Attorney has felt justified in telling this Court the result of his questioning of the Narcotics Agents on this intriguing, belatedly disclosed revelation of electronic monitoring. Is it conceivably consistent with the recent program of *Black*-to-*Granello*, which the Solicitor General and the Supreme Court have jointly been mapping out, that an extraordinary revelation of this kind should be allowed to result in final, *unadjudicated* "repose" for the Government's ardent prosecutive officials without first affording to the opposing side a chance to ask its own questions, under proper judicial supervision, with a view to finding out whether the investigative agents of the Narcotics Bureau have given to the United States Attorney a reliable picture, and whether the United States Attorney has made a legally and factually sound interpretation of what the Narcotics Agents have told him? It has not been our impression that the "Schipani review" procedure operates in quite so unilateral or *ex parte* a fashion as the United States Attorney's letter of April 27, 1967 apparently assumes. Furthermore, if the Narcotics Agents have at last admitted to the United States Attorney that they perpetrated this automobile "bugging", should we not be allowed to question the Agents as to other possible electronic monitorings which have not only not been previously disclosed, but as to which there has been heretofore the most blithely unqualified assurance to the contrary? Earlier in this letter we quoted the colloquy from the pre-trial session of April

27, 1966 in which Mr. Tendy turned to Narcotics Agent Fitzpatrick to obtain further confirmation that there had been no further electronic monitoring. Judge Palmieri, in that same colloquy, expressly asked Mr. Tendy whether he had questioned the Agents and read their reports. Intending no unfairness, we must here state that the result of the latter colloquy was to convey a secure confidence of mind to defense counsel (and to the Judge) that there really was not anything more for anyone to be concerned about in this case as regards other electronic monitoring. What could have been going through Agent Fitzpatrick's mind at that juncture? We do not know, and we surely do not at this point venture any invidious answer. But should we not have the opportunity to question Agent Fitzpatrick—and, with all respect, to question also Mr. Tendy as to what Agent Fitzpatrick represented to him then, and previously, and thereafter? Again we state, it is hard to believe that the Supreme Court (or, for that matter, the Solicitor General when or if this matter may come to his attention) will rest content with the United States Attorney's letter of April 27, 1967 which speaks so soothingly of the Nebbia automobile "bug" as having been non-productive—and which implies that further avenues of inquiry as to this item and as to other possible electronic monitorings in Georgia or elsewhere do not need to be judicially explored. How can anyone have confidence in these implicative assurances when the previous explicit and unqualified assurances proved to have been unjustified? The implications of the belated disclosure as to the Nebbia automobile "bug" in Georgia are not put to rest by its conclusorily alleged non-productiveness. This belated revelation of the Georgia automobile "bug" cries out for Schipani

review in its utmost "*de novo*" and extended implications for the sake of the Fourth Amendment.

Fourth, the United States Attorney's letter of April 27, 1967 also reveals for the first time the trespassory electronic surveillance in 1962-1963 affecting the appellant Dioguardi. The letter states that "none of the conversations related in any manner to this case", and that the Narcotics Agents and the United States Attorney's aides who prosecuted this case were not among those to whom "the existence of the surveillance [or] any information overheard was communicated". In all earnest respectfulness, we must insist that this is not a satisfactory statement with reference to the "Schipani" and Fourth Amendment issues which we here urge. At the very least, we hereby expressly request that we be permitted to inspect the "logs reflecting the content of these conversations" which the United States Attorney states "are available and show that none of the conversation related in any manner to this case". In *Granello-Levine* the Solicitor General stated to the Supreme Court that, in the situation there presented (which was closely comparable to the situation of allegedly non-connected matters here claimed by the United States Attorney to exist), "petitioner's counsel will have a full opportunity to examine these logs, under an appropriate protective order, as a consequence of our action in the courts below respecting his other convictions. This, we believe, will confirm the proposition that there is nothing in them relevant to the instant case. If petitioner should be of any other view, he may, of course, seek a remedy in the district court" (*Granello-Levine,* U.S.SCt., Brief For The United States

In Opposition, pp. 20-21). The United States Attorney's letter of April 27, 1967 does not tender to us any such opportunity to examine the logs of the Dioguardi Florida monitoring. We hereby respectfully request such opportunity as being an absolute prerequisite to any just constitutional decision of this case under the tests of the Fourth Amendment. Our interest in examining these Florida logs is not a matter of "standing on one's procedural rights" in a merely technical spirit, nor is our interest in evaluating the contents of those logs a merely academic one. The Government's *ipse dixit* that "none of the conversations related in any manner to this case" may or may not prove to be justified. Surely the independent efforts of defense counsel to discover pertinent significance in those logs cannot be concluded in advance to be futile merely on the Government's *ex parte* assertion; *a fortiori* independent judicial judgment on this question, reached after a proper adversary hearing, cannot be discounted in advance as futile. No one can say, without the benefit of such a hearing, that all or any of the following possibilities are predictably certain to be rejected by a Court after such a hearing:—That the Florida monitoring involved narcotics or leads to narcotics; that such narcotic leads or any other leads generated by the Florida monitoring may have proved useful to the Government for the present prosecution in one way or another; or that diligent defense questioning of the Agents or other persons in course of such a hearing would throw further doubt on the reliability of the assurances of the Government as to the extent and the methods of its overall electronic monitoring activities affecting this case.

We therefore submit that, in the light (again) of the developments from *Black* to *Granello-Levine*, the very least to which we have now become entitled is a remand or some other appropriate order of this Court directing a reference of this entire matter for full judicial hearing to develop anew the facts of the three monitorings now admitted by the Government and of possible other monitoring as may be revealed through the probing procedures of such a *de novo* judicial hearing. We say this is the least to which we are now entitled; we of course adhere to our previous contentions in these appeals, now fortified, that the judgments should be reversed and the indictment dismissed.

* * * * *

All of the foregoing presentation in this letter has been prompted by the exchange of recent correspondence between Mr. Fusaro and the United States Attorney. We trust that the following additional remarks may appropriately be included in this letter as likewise pertaining, although less expressly, to that exchange of correspondence.

Mr. Fusaro's letter of April 18 did not ask the United States Attorney for any information about President Johnson's order of June 30, 1965 prohibiting or restricting electronic monitoring; and the United States Attorney's letter of April 27 did not touch upon that subject either. Nor, so far as we know, has the Government given the Court any additional information on that subject since the filing of the Government's supplemental memorandum after argument. In our own prior papers filed herein we have continued to ask that the Court direct the Government to supply

additional information on this subject. We have also ourselves been trying to find out more about the contents of President Johnson's order. In our last previous motion papers herein (filed March 27, 1967) we informed the Court that in following up a newspaper report that Attorney General Clark had appeared before the McClellan Committee on the subject of the President's current legislative proposals *re* electronic monitoring, we had had a telephone conversation with a staff member of the Committee in which it had come about that the Committee might be interested in using written questions which we would prepare for the purpose of clarifying the contents of President Johnson's order, it being expected that the Attorney General would return before the Committee for further testimony. We did send the McClellan Committee the following list of questions:

"April 15, 1967

PROPOSED QUESTIONS TO BE ADDRESSED TO ATTORNEY GENERAL RAMSEY CLARK BY THE SENATE SUBCOMMITTEE ON CRIMINAL LAW AND PROCEDURE.

1. In the *Black* and *Schipani* cases in the Supreme Court, the Department has referred to a directive or order by President Johnson, on June 30, 1965, prohibiting electronic surveillance by the entire executive establishment except in national security cases. Can you tell us the exact contents of the President's order or directive?

2. Does the Department of Justice construe the President's order or directive as limited to telephone wiretapping and trespassory or physically pene-

trational installation and use of concealed microphones or 'bugs', or does the President's order also cover any other kind of electronic surveillance?

3. Does the President's order cover 'parabolic mikes'? Detectaphones? Microphones placed at or near the edges of doors or windows of private premises? Minifons worn on the person?

4. Will you please furnish to this Subcommittee, for publication, or will the Department of Justice publicly release by any other media, an official written statement setting forth the exact words of the President's directive of June 30, 1965, along with a separate written statement of the Department's construction or interpretation of the President's words?"

On April 20, 1967 we received a letter from James C. Wood, Esq., Assistant Counsel of the McClellan Committee (Senate Judiciary Subcommittee on Criminal Laws and Procedures), stating in part as follows:

> "Unfortunately, we did not have sufficient time to question the Attorney General about wiretapping, but we expect to have him continue his testimony at our next series of hearings in May. At that time we shall certainly use some of your questions."

The United States Attorney's office has been contending, evidently on the basis of no more actual knowledge than any of the rest of us possess, that President Johnson's order of June 30, 1965 applies only to outright trespassory "bugging" (and, it would seem, telephone wiretapping).

Appendix C—Counsel's Letter Re Electronic Eavesdropping

In support of these contentions the Government has referred, in various of its papers herein, to the fact that the Solicitor General opposed certiorari in the *Pardo-Bolland* case, and to cases of non-trespassory monitoring of the "minifon" type involved in the *Osborn* case or of the concealed listening device type in a Government agent's own room as involved in *Jakob* v. *United States,* October term 1966, no. 766 and no. 973 Misc. (decided by this Court *sub nom. United States* v. *Edwards,* 366 F. 2d 853 (C.A. 2, 1966)). What the Government has not pointed out, however, in referring to *Pardo-Bolland, Osborn* and *Jakob* (*Edwards*) is that the monitoring in all of those cases long pre-dated the President's order of June 30, 1965.

It is also significant to trace out the extremely interesting verbal-formulary evolution of the Solicitor General's own interpretation of the President's order in the papers filed by the Solicitor General in *Black, Schipani, O'Brien-Parisi* and *Granello-Levine.* In *Black* and *Schipani* the Solicitor General's references employed wordings which, we admit, are susceptible of meaning that the President's order was being treated *in those cases* as applying to forms of monitoring clearly outlawed by prior decisions of the Supreme Court. But in *O'Brien-Parisi* the Solicitor General used quite different words in apparent reference to the President's order as deemed applicable under the then recently announced *Schipani*-review policy. Thus, at pp. 10-12 of the Brief For The United States in *O'Brien-Parisi,* the Solicitor General stated that "Pursuant to" the *Schipani*-review policy "we have conducted a review to determine whether any electronic eavesdropping or wiretapping affected the convictions of either of the petitioners. It

appears from this inquiry that neither petitioner was the direct subject of electronic surveillance and that no such surveillance was conducted on the residence or business premises of either petitioner". Could there be a clearer indication that the Solicitor General has decided to administer the *Schipani*-review procedure in the most comprehensive manner with a view to determining whether "any electronic eavesdropping" was involved? Note, in the item just quoted, the apparently deliberate separate inclusion of a duty of disclosure as to both "electronic surveillance" without further qualification, and as to "such surveillance * * * on the residence or business premises of either petitioner".

Similarly in *Granello-Levine* the Solicitor General told the Supreme Court that "Pursuant to" the *Schipani* policy "we have conducted a review to determine whether any electronic eavesdropping or wiretapping affected the conviction of either of the petitioners. It appears from this inquiry that no conversations of petitioner Granello were overheard by any electronic surveillance; he was never the direct subject of an electronic surveillance nor did he engage in conversations held on other premises which were subject to such surveillance" (October Term 1966, no. 750, Brief For The United States In Opposition, p. 16).

We submit that the above described indications of the Solicitor General's broadly inclusive interpretation of the President's order as applied to *Schipani*-review situations, and the failure thus far of the Government in this case to furnish a statement of the actual contents of the President's order, make it appropriate for us to renew our

prior request that such information be furnished by the Government.

Respectfully submitted,

/s/ ABRAHAM GLASSER
Abraham Glasser
Of Counsel for Appellants

cc: Hon. Robert M. Morgenthau
United States Attorney

Fred A. Jones, Jr., Esq.
David M. Markowitz, Esq.
Arnold C. Stream, Esq.
Irving Younger, Esq.

APPENDIX D*

Appellants' Brief in Court of Appeals After Remand *Re Electronic Eavesdrop Issues*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 30849

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

SAMUEL DESIST, FRANK DIOGUARDIA, JEAN CLAUDE LEFRANC, JEAN NEBBIA and ANTHONY SUTERA,

Defendants-Appellants.

BRIEF FOR APPELLANTS AFTER REMAND HEARING *RE* ELECTRONIC SURVEILLANCE

This brief is respectfully submitted on benalf of the appellants, by permission of the Court, following the opinion and report of Hon. Edmund L. Palmieri, D.J., relating to the recent hearing before Judge Palmieri on electronic surveillance pursuant to remand orders of this Court.

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* At pp. A 69 et seq., *infra,* reference is made to Defendant's Exhibit A, a tentative list of proposed defense witnesses in the remand hearing in the District Court. At pp. A 73 et seq., *infra,* reference is made to Defendant's Exhibit B, a statement of relevancy of proposed defense proof in that remand hearing. These two documents are printed as Appendix E hereto, pp. A 97 et seq., *infra.*

Appendix D—Appellants' Brief Re Electronic Eavesdrop

Preliminary Statement

We shall not here repeat the extensive details of our previous briefs and other papers which seem to us to impugn the truthfulness of the Narcotics Bureau witnesses as to the methods used in carrying out the Waldorf Astoria eavesdropping on which the narcotics conspiracy convictions of these appellants were so largely based. Nor shall we here repeat the likewise extensive details of the Government's long-continued reluctance to meet properly its obligations under the "Schipani" procedure, a reluctance which had to be dealt with by successive directives from this Court. However, without now re-threshing the details of these distressing prior matters, we must continue our efforts to keep these matters in the forefront. The Government's conduct in question which preceded the recent remand hearing before Judge Palmieri should not be permitted to fade from this case as being merely some sort of "background" that has lost importance in the overall constitutional evaluation of the electronic search issues.

On the contrary, the recent hearing before Judge Palmieri, as we shall show, has brought to a new climax the puzzling behavior of the Government in regard to its constitutional obligation of disclosure of its electronic search activities in this case.

Regrettably also it appears to us—with all earnest respectfulness—that the District Court in the recent remand hearing misconceived its own constitutional obligations; for as we shall show, the District Court failed to enforce upon the Government an appropriate compliance with the

duties of disclosure which this Court formulated in its order of remand.

In offering the above broadly stated introductory contentions, we are only too keenly aware that the opinion and report of the District Court reads powerfully indeed. Its power, however, is only on the surface, as we think this brief will demonstrate.

The primary issue is whether the recent District Court hearing (and adjudication) complies with this Court's mandate for a "full hearing"—or whether instead unworthy procedural technicalities, unworthy procedural tactics of the Government, and ill-advised procedural rulings by the District Court have availed to thwart the constitutional purposes which motivated this Court's orders of remand. Putting it in another way, the issue is whether, considering the record as a whole (including the prior conduct of the Government), there has now emerged a judicially palatable (by constitutional standards) record and adjudication absolving the Government and finally precluding the defendants-appellants in the electronic search matters to which this Court's orders of remand were addressed.

Summary of the Proceedings and Testimony in the District Court Hearing

(Together with this brief we are filing copies of our typewritten "Brief For Defendants-Appellants After Remand Hearings Re Electronic Surveillance, With Requests For Findings" which we submitted to Judge Palmieri. Since that document contains detailed references to the hearing record, we shall occasionally refer to it in this brief, for the sake of brevity.)

Appendix D—Appellants' Brief Re Electronic Eavesdrop

The hearing before Judge Palmieri was based upon two orders of this Court, the first of which referred to a communication of April 27, 1967 from the United States Attorney. The first order of this Court, dated May 29, 1967, provided as follows:

> "Upon consideration of the letter of April 27, 1967, to the Clerk from the United States Attorney, and the letter of May 1, 1967, to the Clerk from counsel to appellants.
>
> IT IS HEREBY ORDERED that the case be remanded to the district court so that the trial judge may conduct a prompt and full hearing to ascertain the Government's use of electronic equipment on the occasions referred to on page 2 of the above-mentioned letter from the United States Attorney, the effect, if any, of such use on the trial and conviction of appellants or any of them, and whether or not a new trial should be granted. At such hearing the district court will confine the evidence presented by both sides to that which is material to questions of the content of any electronically eavesdropped conversations overheard on those occasions, and of the relevance of any such conversations to petitioners' subsequent convictions;
>
> IT IS FURTHER ORDERED that the district court judge make such findings of fact and conclusions of law, as may be appropriate in light of the further evidence and of the entire existing record, and report to this court, which retains jurisdiction of the appeal;
>
> IT IS FURTHER ORDERED that such report and any other matters in connection with this appeal be referred to the panel that heard argument of this case on January 19, 1967."

Appendix D—Appellants' Brief Re Electronic Eavesdrop

The portion of the letter of April 27, 1967 from the United States Attorney referred to in the above order read as follows:

> "a) On December 18, 1965, in Columbus, Georgia, agents of the Bureau of Narcotics installed an electronic listening device in an automobile prior to its rental by Jean Nabbia. The device did not work and no conversations were overheard or recorded. This office was not aware of the installation of this device at the time of the trial below.
>
> b) Between April 25, 1962 and April 1, 1963 agents of the Federal Bureau of Investigation installed, by trespass, an electronic listening device in the business establishment in Miami, Florida of an individual having no connection with the instant case. In 1962, two and a half years before the inception of the conspiracy, defendant Frank Dioguardi was overheard as a participant in two conversations at said establishment. Logs reflecting the content of these conversations are available and show that none of these conversations related in any manner to this case. Neither the existence of the surveillance nor any information overheard was communicated to the Bureau of Narcotics or to Government counsel who prosecuted the case."

The second order of this Court, dated June 14, 1967, referring to a motion of the defendants-appellants *(infra)*, provided as follows:

> "Referring to the prayer for relief contained on page 10 of the within motion, it is ordered that No. (1) be granted to the extent of allowing appellants to explore, in addition to the incidents described in the letter of April 27, 1967 to the Clerk from the

> United States Attorney, the question of whether any governmental personnel engaged in any other electronic eavesdropping of any other kind which related to this case, except that prayer for relief No. (2) is denied and the motion is in all other respects denied."

The motion of the defendants-appellants referred to in the order last quoted contained the following prayers:

> "* * * (1) that at the hearing on remand before the District Court the appellants be permitted to explore the question of whether any Government personnel engaged in any other electronic eavesdropping of any other kind which related or might relate to this case, i.e., any such other electronic eavesdropping in addition to those instances referred to in United States Attorney Morgenthau's letter of April 27, 1967; (2) that at said hearing on remand before the District Court the appellants be permitted to explore the question of whether the electronic eavesdropping litigated at the trial of this case was effected in the manner claimed by the Government. We also now respectfully renew all of the motions and requests previously made to this Court during the pendency of the within appeals, with respect to the issue of electronic eavesdropping."

It should be noted here that the latter motion of the defendants-appellants had cited *Hoffa* v. *United States*, U.S. , 18 L.Ed. 2d 738, in support of the prayer for an enlargement of the scope of the remand hearing to include any other electronic eavesdropping of any other kind which related or might relate to this case; and it has been assumed by both sides herein that this Court's above quoted order of June 14, 1967 reflected the standards laid down in

the *Hoffa* case, *supra*. As will appear, an issue arose before Judge Palmieri as to the scope of this Court's order of June 14, 1967, and Judge Palmieri resolved the issue in favor of the Government, giving rise to one of our claims of procedural error (*infra*).

In turning now to our description of the proceedings before Judge Palmieri, we note preliminarily that, for convenience in evaluating the constitutional fairness of the proceedings below as that issue evolved on the record, it seems desirable to describe the proceedings in a chronological manner; this chronological method will not hamper, we believe, the presentation of the hearing testimony in a meaningful way. Also, for convenience in citing the pages of the stenographic minutes of the several hearing days, we shall indicate each hearing date by a heading at the margin, thereafter citing only page numbers for each such date, without repeating the hearing date each time for each page number, except as the context may require otherwise. It will be recalled also that, for brevity, we shall be referring occasionally to the typewritten brief filed by us before Judge Palmieri, extra copies of which are submitted herewith as previously stated.

June 7, 1967:

See the brief which we filed before Judge Palmieri, at p. 3 (hereinafter the latter brief will be cited as "DB").

At the outset of the first hearing day (June 7, 1967), the District Court, referring to the Government's duty in this hearing said, "There should not be any secrets about this proof. Whatever the proof is, the Government is under a very clear obligation to set it forth, place it before the

Court, make it available to counsel'' (S.M. 3). Unfortunately, the District Court did not adhere to this initial wise procedural insight (details *infra*).

Also, on June 7, defense counsel asked that the Florida tape recordings be produced and that the pertinent eavesdrop devices be produced or reconstituted, and the District Court agreed; the Government announced that no tapes existed, and it objected to producing or reconstituting the electronic devices, but the Court continued to agree with defense counsel as to the latter (S.M. 13-22). Unfortunately, again, the Court did not later adhere to its initial wise view on this vital matter (details *infra*).

Since Judge Palmieri's opinion and report herein deals so prominently with the theme that the defendants-appellants were afforded ample opportunity to litigate their constitutional rights in the recent District Court hearing, it becomes important to scrutinize the record closely on that subject, and we shall present the pertinent record items in this brief. The first of those items appears in the proceedings at the June 7 session before Judge Palmieri, where defense counsel portrayed in detail their need for reasonable time to prepare; indeed at that juncture—which was only a few days after this Court's first remand order, arrangements had not been made for retention of defense counsel for the purposes of the remand proceedings (S.M. 23-43).

June 14, 1967

See DB 3-4.

At this second day of the proceedings below (June 14, 1967) the District Court announced the amended order of

this Court which had been made that same day, enlarging the scope of the remand hearing to include any and all other eavesdropping which may have affected this case (S.M. 1-4). In the light of the amended order, defense counsel emphasized with renewed urgency that adequate opportunity for defense preparation, including an effective independent defense investigation, was indispensable*; it was at this juncture that the District Court first began to manifest a sense of inconvenience or impatience in the face of the indicatedly enlarged hearing task—we intend no disrespect in making this latter observation, but we do feel obliged to do all that we properly can in order to commend our clients' situation to sympathetic constitutional understanding by the reviewing Tribunals as regards the incipient "folklore" imputation in this record that we are being some sort of ingrates or litigious "pests" because we are protesting lack of fair due-process procedural hearing opportunity; the above suggested concern of the District Court which first manifested itself at the June 14 session took the specific form of an indication by the Court that it might wish the Government to proceed with its own case before completion of the defense investigation, whereupon defense counsel—instantly sensing that defense cross-examination of Government witnesses on the Government's direct case might well be handicapped by such a procedure—requested, and received assurance from the Court, that our opportunity in terms of a "second round" (for effective

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* Arrangements for retention of defense counsel had not yet been effected, incidentally, as some of the defendants had to be brought to New York from other places of imprisonment.

opportunity for cross-examination) would be kept in consideration (S.M. 6-11, 14-19, 21-23).

June 19, 1967:

See DB 4-5.

At the June 19 hearing we were in a position to advise the Court for the first time that the defendants had been able to complete their arrangements for employment of counsel; defense counsel also again urged the difficulty and unfairness of being obliged to proceed with the evidentiary phases of the remand hearing—i.e., of being obliged to proceed *via* presentation of the Government's case when the defense was not ready for effective cross-examination because our own investigation needed to be done first (S.M.1-7).*

Also at the June 19 session the Government urged the Court to recede from its previous position that the electronic devices should be produced or reconstituted, the Court reserving decision (S.M. 12-15).

Also at the June 19 session defense counsel announced names of witnesses (several Federal Narcotics Agents)

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* Several times in the remand hearing below we were obliged to make the embarrassing disclosure that our efforts for an effective independent defense investigation were hampered by the severe financial circumstances of our clients, whose respective personal circumstances have undergone the familiar financial attritions of projectedly long-term incarcerational doom. The position of the Government—supported, unfortunately, by the Court below—in refusing to discharge its constitutional obligation of making a plenary presentation of the relevant electronic-search facts, combined with the financial hardships of the defendants, has resulted in a mocking of constitutional due-process procedure in what we had thought would be an authentic "Schipani-type" hearing in this case.

whom we would want in light of the amended order of this Court and of the fact that this was not an "adversary proceeding" in the ordinary sense but was a proceeding in which the Government had a constitutional obligation of unstinting disclosure; defense counsel also noted that additional names of witnesses would be forthcoming; the Court reserved these matters until after the Government should proceed with its *prima facie* case, and the Court added, "Let's wait and see what the Government offers. Cross-examine to the best of your ability at that time and at that point we can then make some sounding to determine what the future course of the hearing should be" (S.M.25-28, 32).

June 26, 1997:

See DB 5-8.

On the above date the Government proceeded with its *prima facie* case; defense counsel first again noting objections to the Government's narrow formulation of the scope of its obligations under this Court's orders of remand, i.e., the Government's proposal that it not be required to submit any proof as to the technological method of the electronic devices used; the District Court reserved its rulings on these objections (S.M.22, 207).

Before the Government proceeded with its *prima facie* case on June 26, we also objected to being deprived of access to the entirety of the F.B.I. logs of the Florida eavesdropping; the Court sustained the Government in its refusal to show us anything except selected portions of the logs in which conversations involving the defendant-appellant Frank Dioguardi were overheard (S.M. 13-21).

Appendix D—Appellants' Brief Re Electronic Eavesdrop

The Government's *prima facie* case as to the Florida eavesdropping consisted of the introduction in evidence of the excerpted portion of the logs above mentioned, plus submission for the Court's own examination (and for sealing for appellate examination) of the Florida logs for the entire year or so (1962-1963) mentioned in Mr. Morgenthau's letter of April 27, 1967, and of testimony by three F.B.I. monitoring clerks from the Miami office who had monitored the portions of the eavesdrops for which excerpted logs were shown to us and who had prepared those portions of the logs (DB 5-8). From the excerpted portions of the logs shown to us (Government's Exhibit for identification 103) it is said that the Government "proved" that nothing which was overheard in the Florida trespassory electronic eavesdrop concerning defendant-appellant Dioguardi related to this case, and that no other defendant in this case was overheard in that eavesdropping; and the District Court announced that it had examined the entire logs (Government's Exhibits for identification 100 and 102) and had found nothing further therein affecting any defendant in this case (S.M. 20—June 26, 1967). For reasons which may be more meaningfully considered after we note the testimony of the three F.B.I. Miami monitoring clerks, we contend that it was a denial of fair hearing to restrict our access to the logs in the manner just described.

As to the testimony of the F.B.I. Miami clerks, our recitals in this brief may be kept short (see, again DB 5-7). All three of these clerks testified, in essence, that they monitored a device (description of which was prevented by the Court's rulings (e.g., S.M. 33-39)) in the Miami F.B.I. office

which was picking up conversations from a bar in Miami called the Casa Maria or Dorey's; that the within defendant-appellant Dioguardi was at times overheard in those conversations; that the clerks at times would make handwritten notes of what they heard and when something relevant or important seemed underway they would play the tape recording and make a transcript (or log) thereof, sometimes using the tapes and the written notes in aid of each other, the tape recordings and the monitoring device not having functioned perfectly at all times; that as soon as the written notes had served their purpose in making up the logs the notes were destroyed; and that the tapes were invariably erased at the end of seven days after each tape was made, in accordance with a regular procedure in the Miami F.B.I. office.

Of special interest was the further testimony of all three clerks—on cross-examination—that at times the Casa Maria-Dorey's eavesdropping was conducted during a shift from midnight to eight A.M. (S.M. 54-56, 70-73, 165, 177). This latter is of special interest, we say, because the Government did not produce any witness who participated in such post-midnight eavesdropping;* we do not know whether the complete logs (Exhibits 101, 103), which we were never permitted to see, include any post-midnight eavesdropping. It seems extremely strange that there should be no logs (if such in truth be the case) for this year-

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* It is the recollection of defense counsel that none of the logs shown to us (Exhibit 101) covered any post-midnight items. We have not seen the Exhibit in question since the hearings below; we shall re-check the Exhibit and if necessary we shall advise the Court further by letter in the immediate future.

long F.B.I. "bugging" of a place like the Casa Maria-Dorey's drinking establishment in which nothing overheard after midnight was deemed worth preserving. The entire log we have never seen, as said, but we saw in open Court as it was being handled by the Government and the Court that it is an item apparently weighing some pounds and apparently containing many hundreds of pages. Where, then, are the post-midnight materials in this massive year-long "bugging" of this Miami night spot? Is it to be simply *assumed* that the Government eavesdropped no conversations at all by Frank Dioguardi after midnight during the entire year in question when he was evidently a habitue of that place?

The disturbing questions which we have just suggested become the more disturbing when it is recalled that the F.B.I. allegedly had a regular seven-day erasure procedure in which, allegedly, all of the original tapes of the Casa Maria-Dorey's eavesdropping were destroyed. See further as to this erasure procedure, *infra.**

As indicated in the immediately preceding footnote, the foregoing concluded—or would have concluded but for developments to be described shortly—the Government's entire case in supposed discharge of its burden of disclosure as to the Florida eavesdrops; that is, the Government evi-

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* We are deferring our further description of the testimony on this tape-erasure subject in the proceedings below because the foregoing was as far as the Government cared to carry its presentation on this subject as part of its own case in this hearing; it will be recalled that we are deliberately presenting our within summary of the proceedings below in a chronological manner so that this Court may see just how the procedural injustices in this hearing evolved.

dently deemed—until it was almost literally forced to a different view by the District Court (*infra*)—that nothing more was needed to dispose of the Florida eavesdropping problem in the Government's favor than to "show" that the tapes had been destroyed by three subordinate employees of the F.B.I. and to *assert* that the logs produced in Court tell the whole story.*

Resuming our summary of the proceedings of June 26, 1967:—After the above testimony by the Florida F.B.I. clerks, the Government took up the Columbus, Georgia, Avis Car-Rental eavesdrop of December 18, 1965, the second of the two new items revealed in Mr. Morgenthau's letter of April 27, 1967. Narcotics agent Jacques I. Kiere testified for the Government on this subject (S.M. 176 *et seq.*). Agent Kiere said that the Georgia car bugging surveillance started shortly after noon on December 18, 1965, and it continued until shortly after midnight of that day, when it was terminated on the road between Columbus and Atlanta (S.M. 178-180). Occasionally Kiere left the Government vehicle (S.M. 179). Automobile surveillance was resumed on the morning of December 19, but without a listening device (S.M. 180-181). The device of the preceding day did not work (S.M. 179-180). Kiere never made any notes or reports about the use of electronic equipment (S.M. 210).

With the above beautifully simple testimony of Agent Kiere on June 26, the Government evidently thought it had

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* As will be seen, the supplemental testimony which the Government later adduced concerning the Florida eavesdropping, under practical compulsion by the District Court, failed nevertheless to dispose of the troublesome questions which we have above suggested.

the entire remand hearing so "wrapped up", on both the Florida and Georgia items, that it took a step which may justly be characterized as procedurally astounding, and which we submit reveals more starkly than perhaps any other incident in this entire picture how far the Government has been and is from appreciating its constitutional duties in the present matter. It will be recalled that throughout the within hearings in the Court below we had been pleading with Judge Palmieri not to force the hearing forward on an evidentiary basis until we were ready with the results of our independent investigation, lest otherwise we be unfairly hampered in cross-examining on the Government's *prima facie* case. As of June 26, 1967, the hearing session which we are now discussing (and in which our above summary had reached the point of the termination of Agent Kiere's simplistic direct testimony), we had just been able to commence our investigation a few days before, as we had advised the Court (S.M. June 19, 1967, p. 8); we had also advised the Court of the financial difficulties which our clients were having in providing us with an investigative budget (*supra*). It was thus perfectly well understood by the Government that we surely were not going to be ready for *investigatively prepared* cross-examination of *all* Government witnesses at the proceedings on the Government's *prima facie* case on June 26, 1967. We did, however—out of perhaps excess of complaisance under the time pressures which the Court stated it felt—assure the Court that we would make every good faith endeavor to cross-examine Government witnesses without awaiting the completion of our own investigation (e.g., S.M. June 26, 1967, pp. 28-29).

And we did cross-examine the three Miami F.B.I. clerks (*supra*).* But, as suggested in the last preceding footnote—and for the reasons there explained—the last thing that we, as defense counsel, were prepared or willing to do on June 26 was to set foot into a premature cross-examination of the Government's evidently-intended prime witness (Agent Kiere) on the all-important subject of the Georgia car bugging. We therefore announced that we were invoking our previously reserved right to defer cross-examination of Agent Kiere at that juncture (S.M. June 26, 1967, p. 181).

The next ensuing happenings are important as demonstrating how the defendants became procedurally hog-tied

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* We trust that in the framework of this constitutionally-based "Schipani-type" judicial inquiry we may mention the following off-the-record facts, as being a representation by counsel as members of the Bar of this Court:— So stringent were our budgetary limitations for our investigation herein that, after prolonged conference among all defense counsel and all defendants, it was reluctantly decided that we could afford the expense of investigation as to only the situation of the Georgia car bugging. Naturally we could not disclose this in the proceedings below, as it would have been unfair to our clients to apprise the Government of this unavoidable weakness in our investigative front. Accordingly, we cross-examined the F.B.I. Florida witnesses on June 26, 1967, for the simple reason that, having been unable to undertake the expense of any investigation of the Florida situation, there was no reason to defer that particular cross-examination. Quite otherwise was our strategic posture, as defense counsel, in regard to the cross-examination of Agent Kiere (concerning the Georgia car "bug") on June 26, for as to that phase of the case we had committed, for good or ill, our entire meager investigative budget and we did not yet have our investigative results. The Government has taunted us in the proceedings below, and we doubt not that it will do so again in its forthcoming presentation before this Court, for our alleged failure to develop more concrete investigative results in sectors of the case other than the Georgia situation. At the appropriate place in this brief *infra*, where we shall be taking up the record facts as to our own proofs and offers of proof in the Court below, we shall speak further of this question of the hopes and the disappointments of our recent investigation.

in this hearing through the District Court's toleration of the Government's obstructive tactics; the record relating to these next developments (at the June 26 session) needs to be noted in some detail:

In response to our above noted announcement of June 26 that we were invoking, with respect to Agent Kiere, our previously reserved right to defer cross-examination until our own investigative preparations were completed, the Court stated (S.M. 181), "All right. We will see. We will just go on with the Government's proof and then we will reoffer the witness [Kiere] for cross-examination."

Government counsel then insisted that our position caused inconvenience to the Government by reason of Kiere's travel status, the Government having brought him from Europe; and that we should be required to proceed (S.M.181-182). There followed a short colloquy between the Court and defense counsel in which we agreed to proceed with the cross-examination of Kiere for the limited purpose of laying a foundation for later resumed questioning as to whether he knew of any other electronic eavesdropping in this case, and in response to those foundation questions Kiere answered in the negative (S.M.182-183). What we were reserving for further cross-examination of Kiere was, of course, the crucial matter of his credibility in the light of what we were at that time beginning to expect our investigation to produce (S.M. 184). Nevertheless, as just seen, we submitted to the Government's and the Court's desire that we at least commence a cross-examination of Kiere. And when we concluded our short cross-examination (*supra*), we immediately informed the Court that "we are going, we hope, to be prepared, your Honor,

to re-address ourselves to this subject within a reasonable time, and at that time it may be necessary to call Mr. Kiere back'' (S.M.183).

We then expressly formulated to the Court our above noted expectation that we wanted also a further opportunity, upon completion of our investigation, to probe Kiere's credibility concerning the Georgia incident (S.M.184).

This last apparently in some way disturbed the Court, for it seems to have produced a sudden re-orientation of the Court's attitude concerning what we thought had been a pretty safe assurance to us that we would have adequate cross-examination rights after completion of our investigation, that is, that we would have (as we previously phrased it) a ''second round'' with respect to the Government's direct case (which the Court had wanted put in without waiting for completion of our investigation). The re-orientation of the Court's attitude just referred to appeared at S.M.184 (June 26, 1967) when, in responding to our above noted statement that we intended to probe Kiere's credibility as soon as were adequately prepared to do so, the Court said, ''I will have then to defer judgment pending an offer of proof by you''; the Court went on to explain that since Kiere had said nothing was audible on the Georgia car bug, there was no basis for cross-examination on the then record, wherefore we would have to justify bringing Agent Kiere back when and if we should be in a position to ''make an offer of proof which would require his presence'' (S.M.184-185). We then pointed out that ''We asked your Honor with all due respect not to press us to try this and present this hearing until we were ready with our cross-

examination. Now to tell us we can't cross-examine him unless we make an offer of proof at the right time is to prejudice us * * *. Even though I don't do it until next week or I don't have any evidence, then I still want to cross-examine this man. There are many things that I want to interrogate him on, but I don't want to do it now when I am not prepared'' (S.M.185).

Colloquy then continued in which the Government pressed that we should be required to continue the cross-examination of Kiere; we again pointed out the handicaps under which we were operating (as noted *supra,* our investigation had commenced barely a week previously); the Court apparently began to orient back towards a more receptive attitude in favor of our position but still placing us under obligation to make an offer of proof and still declining to assure us that we could later cross-examine Kiere again; Government counsel again pressed that Agent Kiere should be finally excused and protested that ''I don't think that this burden should be imposed upon us,'' to which the Court replied ''I see no way to escape it, Mr. Tendy''; defense counsel again urged that we had proceeded diligently and that the impasse was not of our making because we had urged from the outset that the evidentiary phases of the hearing should await completion of our investigation; Government counsel then saw fit to impugn our good faith, accusing us of ''unconscionable conduct''; thereupon the Court excused Agent Kiere, and defended us against the charge of bad faith; the Court then went on to say that the Government should proceed with its case and called upon the Government to produce its next witness (S.M.185-191).

This latter direction of the Court to the Government that it should continue with its direct case without requiring us at that juncture to undertake full cross-examination was the immediate precursor to a climactic happening in this hearing. Right after this direction by the Court there was a short colloquy of three sentences between the Court and defense counsel about 3500 material of Agent Kiere, and before this 3500 discussion was brought to a result, Government counsel exclaimed, "Your Honor, the Government rests". (S.M.191).

We have no hesitation in stating that we (defense counsel) were thunderstruck by this announcement. Indeed, we were at first unable to accept that the Government meant the announcement in a literal and final sense, and we even asked Government counsel, in earnest colloquy, restating our question several times, whether their action in thus suddenly resting the Government's case represented a really final commitment on its part, to which Government counsel replied, "You take it any way you want" (S.M. 191-192). Even after this response, we continued to urge upon Government counsel that they should bethink themselves; we said, "If it is so intended [as a final resting by the Government], it should be so stated on the record so we can procedurally avail ourselves of this surprising development. But if this is not so, we don't want to take any undue advantage of it" (S.M. 192).

The Court then asked Government counsel to reconsider their action, adding "I believe you have other witnesses who are prepared to testify, and once you make a clean breast of this entire situation and all the evidence which

you have at your command, that is the time I thought you were going to rest" (S.M. 192). Government counsel's reply to this request from the Court was that "This possible tactical approach, regardless of what happens here this afternoon, is something that [we] * * * anticipated a long time ago. * * * This is not the result of impetuosity on the part of the Government" (S.M. 192-193).

After some further desultory colloquy among counsel and the Court (S.M. 193-195), the Court asked Government counsel whether they had called all of the Government personnel who actually monitored and transcribed the Dioguardi portions of the Florida eavesdrop, and the Government replied in the affirmative (S.M. 195-196). Evidently, in making this inquiry of Government counsel, the Court was undertaking to assess whether in some formal or technical sense the Government had put in enough of a *prima facie* case as to the Florida situation so that the Court might not be under the necessity of compelling the Government to proceed further—we may take it also that as to the Georgia situation the Court conceived the Government's "*prima facie*" position as consisting, in the formal or technical sense just suggested, of the flatly negative testimony of Agent Kiere.

In any event, upon receiving the Government's assurance as aforesaid concerning completion of its proofs as to Florida, the Court announced that it was "surprised and somewhat disconcerted by the turn of events. However, I am not in position to tell the Government how to proceed, and the Government has to proceed on its own responsibility. They realize the seriousness of this responsibility as much as I do. I would be confronted with the necessity of

making my findings and conclusions on the basis of the record that is made before me''—immediately after which the Court also stated that the defendants were entitled to a fair opportunity to submit their own proof, and ''I don't think they have had an adequate opportunity to prepare or to complete whatever investigation they wanted to make'' (S.M. 196-197).

Shortly after this, apparently sensing the possibility of further pressure in view of some expression of uncertainty by the Court (S.M. June 26, 1967, pp. 197-203), Government counsel hammered at the Court again to preclude us from cross-examining further Agent Kiere, and when the Court refused to do this, Government counsel shifted to the tack that Agent Kiere should be sent back to Europe and if later again needed should be brought back at the expense of the defendants (S.M. 204-206). The relentless pressure by the Government now at last produced the desired effect, as the Court replied to this last-described tack, ''They [the defendants] are taking their position [in] the full responsibility of the fact that they may not be able to persuade me that he should be called back and they may not themselves be able to get him back. They are taking the risk inherent in this situation, as well as your taking the same risks'' (S.M. 206). Defense counsel immediately expressed alarm and protest over this latter statement of the Court, it being again pointed out that all of this could have been avoided if the proceedings had not been rushed without awaiting completion of our investigation; the Court now replied, ''They gave you their *prima facie* case'' (S.M. 206). And the session of June 26 concluded on the note that the Court, with respect to our right to have Agent Kiere recalled, was

"taking no position * * * and I am reserving my judgment completely" (S.M. 211).

*July 6, 1967:**

See DB 8-9.

At an attorney's conference on the above date we apprised the Court that we unexpectedly and unavoidably needed additional time to complete our investigation, and we submitted a tentative list of witnesses (S.M. 1-6; Defendants' Exhibit A for Identification). The Government not only opposed granting us the time requested for completion of the investigation, but it insisted that, having rested its case on June 26, it had "no obligation whatsoever" to "produce anybody", and the Government's chief counsel said, "I don't think it would be fair to even suggest that we might even consider doing this in the spirit of cooperation. The Government has extended itself beyond all possible hope of fairness here" (S.M. 8-12, especially at 10).

Our above mentioned list of witnesses included numerous narcotic agents and other government officials, some of high echelon status, including high Army officers (Defendants' Exhibit A, *supra*). It was plain that this list of witnesses was not pleasing either to the Government or to the District Court (S.M. 8-12, 15, 17-25). As the Court indicated its strong disinclination to allow us to call witnesses at all unless justified by an offer of proof, we assured the Court that at the next scheduled hearing session (July 11) we would submit a statement of relevancy or an offer of proof

* The minutes of July 6 are incorrectly dated July 7, 1967.

in support of our request for the witnesses listed in our Exhibit A (S.M. 17-25). Thus, in this last-described development of July 6 we found ourselves forced into the position not only of needing an offer of proof before we would be able to continue the vitally needed cross-examination of Agent Kiere, but now also of needing an offer of proof even in order to be allowed to call any substantial number of witnesses on our own case.

Our above mentioned Exhibit A list of witnesses included Mr. Tendy and Narcotic Agent Fitzgerald. These two persons the Government agreed to produce for us, both of them being stationed in New York City, and the Court directed that they be heard on July 11 (S.M. 11-12).

However, at this attorneys' conference of July 6 we saw our whole procedural position deteriorating, as the Court (evidently displeased by our Exhibit A list of witnesses) finally took the position, without even awaiting the offer of proof which we had been told might assist us, that there was not going to be any full exploratory hearing in this case, notwithstanding the Government's having slammed the door by resting its "case" on June 26 (S.M. July 6, 1967, pp. 18, 20-21).

Also at the July 6 conference the Court suggested that the Government produce the F.B.I. official in charge of the Miami office, and the Government agreed to this suggestion (S.M. 18-26).

July 11, 1967:

See DB 9-12.

Pending completion of our independent investigation—for which the Court had allowed us until July 18, 1967—we

called as witnesses on July 11 Mr. Tendy and Agent Fitzgerald, and the Government called Miami F.B.I. Supervisor J. Wayne Swinney in compliance with the Court's direction.

Mr. Tendy's testimony (S.M. 8-40) yielded, we may say, no information relevant to the within electronic surveillance issues, except that Mr. Tendy possessed practically no information on the subject. He had no information as to whether the narcotic agents' original visit to the Waldorf Astoria on December 14, 1965 was the result of information obtained through electronic eavesdropping, nor did he know who in the office of the United States Attorney or the Bureau of Narcotics might have such information (S.M. 11-12). Objections were sustained to a defense question as to what had been the conversation between Mr. Tendy and Agent Fitzgerald in the pre-trial hearing on April 27, 1966, which had resulted in Mr. Tendy's assuring the Court that there had been no electronic surveillance except the Waldorf-Astoria incident (S.M. 22-24). Mr. Tendy knew nothing about the "Schipani" review procedure in this case (S.M. 22), and objections were sustained to various questions as to intramural aspects of such "Schipani" procedure in this case (S.M. 24-30, 33-34). Objections were also sustained to questions as to whether Mr. Tendy had conferred with Agent Kiere about the Georgia car bug (S.M. 37-40). As we urge in our argument *infra*, it is difficult to understand how the Government and the Court below can justify the situation depicted in this practically futile examination of Mr. Tendy, i.e., the apparent veiling of the seemingly indispensable *ultimate* facts of the "Schipani" inquiry in this case, the ultimate facts which could

come only from a plenary exploration of the entirety of the acts and records of all Government agents or agencies which have been involved in this case.

Agent Fitzgerald testified (July 11, 1967) that he had entered the case early in 1966, subsequent to the arrests (S.M. 43-44). Objection was sustained to a defense question asking under whose supervision he conducted his operations (S.M. 43-44). Fitzgerald testified that he first learned of the Florida and Georgia eavesdropping incidents in April 1967 (S.M. 46), and objection was sustained as to the source of this incongruously belated knowledge on his part (S.M. 46); objection was also sustained to a question asking the source of Fitzgerald's knowledge that there were no tapes or transcripts of the Georgia car bugging (S.M. 48). Fitzgerald's remarkable certitudes extended even to unqualified assertion of knowledge that no Narcotic Agents in this case had possession of any electronic equipment other than in the three admitted instances (S.M. 49-51). Objection was sustained to a question as to whether there was any electronic activity in this case subsequent to the date of indictment (S.M. 52-53). And objection was sustained to a question seeking to elicit Fitzgerald's previously mentioned conversation of April 27, 1966 with Mr. Tendy (S.M. 53-54).

Thus, the vaunted grace that the defendants were supposed to enjoy from the Government's producing for us the above two Government officials as witnesses in this hearing conferred upon the defendants a wry boon. Substantially the same illusory "benefit" resulted from the Government's production of Miami F.B.I. Supervisor Swinney,

whose testimony was far more significant for its non-disclosures than for what it disclosed. Thus, Agent Swinney, testifying on July 11 (S.M. 54 *et seq.*) was shielded by the Court from answering a host of questions which we submit were proper and important for the just exploration of the constitutional issues in this proceeding. Objections were sustained to questions whether Mr. Swinney had any written instructions concerning supervision of the use of electronic eavesdropping equipment (S.M. 61); who ordered the Miami electronic surveillance (S.M. 63-64); as to any written instructions for the tape-erasure practice (S.M. 71)—which Mr. Swinney stated had been adopted in his office on his own authority and apparently without knowledge or approval of any higher authority (S.M. 69-78, 82-88, 91-93); as to standard operating procedures for the reporting by F.B.I. agents themselves of electronic surveillance activities (S.M. 76-77); as to the purpose or subject matter of the Miami bugging of Tony Ricci (S.M. 89-91, and see 65-67); and as to why another Miami monitoring clerk named Fleck, mentioned in the logs had not been called as a witness (S.M. 93-95). As to Tony Ricci, Mr. Swinney had revealed that the Casa Maria-Dorey's eavesdrop had been ordered as part of an F.B.I. investigation of that individual; in preventing us from exploring the avenue of the Tony Ricci investigation, the Court precluded any chance we may have had to find out whether directly or derivatively the Tony Ricci situation led the Government to narcotics information relating to this case.

Also at the hearing session on July 11 we submitted the written statement of relevancy (Defendants' Exhibit B for identification) which we had promised to the Court in the

colloquies about offer of proof (*supra*) in support of our Exhibit A list of witnesses. Because we respectfully consider the aforesaid Exhibit B Statement of Relevancy to be of prime importance in arriving at a sound appellate evaluation of our contentions herein that the Court below deprived the defendants of their constitutional rights of fair procedure in this hearing, we annex as an appendix to this brief a photocopy of said Exhibit B, and we especially solicit this Court's attention thereto. See also the discussion of our Exhibit B in the Argument, *infra*.

The Court on July 11 expressed itself very strongly in disfavor of our list of witnesses and our showing of relevancy, reiterating that the defendants would have to present adequate proof of the need for going into these evidentiary avenues (S.M. 52, 102-113). The Court did, however, direct the Government to submit documentation as to the "Schipani" reporting from Miami (S.M. 100-101), and stated that it might also wish further high-level disclosure by the Government as to the Georgia car-bugging (S.M. 114-123).

July 18, 1967:

See DB 12-14.

On the above date we were able for the first time to produce results of our investigation in the Columbus, Georgia area. We put on the stand the Black Angus Motel daytime and nighttime managers, Charles B. Brown and Oscar H. Kennington.

Mr. Brown testified concerning intensive headquarters narcotics investigation activities at the Martinique Hotel near the Black Angus (S.M. 30-36); this is a topic which

should have been gone into detail had a plenary hearing been afforded and had we been allowed to call several other Federal and State narcotics officers. Mr. Brown testified also that he gave Federal Narcotic Agents Waters and Selvaggi a key to defendant-appellant Desist's room 108 at the Black Angus Motel on December 18, 1965, and that Waters had come back and said "He is the man" (S.M. 32-35, 49-53, 70).

Brown also testified that groups of the Agents congregated in a room opening off his office at the Motel (S.M. 39-40), during the course of which he heard the Agents saying, on the night of December 18-19, 1965, that Georgia Detective Hollis Bakers' car was following some defendants to Atlanta and that "they could hear from one car to the other" (S.M. 40-41).

Brown also testified that Agent Waters or another Agent had asked him whether Desist was getting any telephone calls and to let the Agent know if such occurred; Desist received a phone call, whereupon Brown rang the Agents' room 7 and told one of the Agents of the call but that it was in French; one of the Agents came to the switchboard to listen to the phone call but when Brown handed him the telephone the speakers had evidently hung up (S.M. 44-45). There was an issue in the hearing below as to whether this latter incident could have occurred, because Brown first placed the incident as having taken place on Sunday evening December 19 when Desist had indisputably left the Motel to return to New York; however, Brown later, in an obviously spontaneous way, corrected himself as to the time of the telephone incident in question; the entire record references needed for evaluation of Brown's

credibility on this point are S.M. July 18, 1967, pp. 43-46, 59-63, 65-68, 73-75; and see also Kennington's testimony (July 18) at S.M. 81, 106-108, 152-155, where the apparent discrepancy as to Desist's motel check-out time is explained in an entirely satisfactory manner.

Kennington's testimony included, besides the items just noted as to the time factors involved in Brown's overhearing of the Desist telephone call, testimony that on December 20, 1965, Kennington having been invited by the Agents to look at the "haul" of heroin spread out on the bed in one of the Motel rooms, he heard the Agents discussing that they had a transmitter in the car which they were trailing and had "gotten good information" (S.M. July 18, 1967, pp. 84-104, 108-113).

In our argument *infra* we treat the District Court's rejection of the credibility of the testimony of Brown and Kennington.

Evidently having made this unfavorable credibility evaluation as to Brown and Kennington *ad hoc* during the July 18 session, the District Court announced at the conclusion of that session that the defense had failed to establish the right to a plenary hearing; the Court directed that one more session be held for the purpose of winding up the higher administrative phases of the Georgia car-bugging, and to allow the defendants to call agents Waters and Selvaggi (S.M. 156-158, 173-202).

July 25, 1967:

See DB 14-18.

It was not until the above hearing date that the Government under direction by the District Court saw fit to try to

address itself to any even remotely adequate showing of the "Schipani" evolution of the information which had given rise to Mr. Morgenthau's disclosure on April 27, 1967 of the Georgia eavesdropping item.*

At the July 25 session the Government produced its Exhibits 15-19, which did purport to trace the high-echelon aspects of the "Schipani" review procedure relating to the Georgia car-bugging. These Exhibits were introduced in conjunction with the testimony of Narcotic Agent Norman Matuozzi, Assistant to the New York District Supervisor in charge of enforcement (S.M. July 25, 1967, pp. 2 *et seq.*). Neither these high-echelon "Schipani" documents nor agent Matuozzi's testimony adequately reached or revealed the ultimate crucial "lower echelon" facts as to the electronic activities of the Narcotics Agents—facts which are available only through a plenary inquiry such as has not yet been had in this case. We have summarized what we consider the pertinent details of agent Matuozzi's testimony in DB 14 (filed herewith—being our typewritten brief in the Court below). What we would emphasize here is that, neither through Matuozzi nor any other proof, did the Government cover the decisive ultimate question of how the Georgia "Schipani" Exhibits denying that the car-bug worked had come into existence when, according to all of the Government's witnesses, nobody had ever made a written report about the Georgia car-bugging, nobody had ever seen such a report, and nobody knew of any such re-

* At the session of July 11 the Government had questioned Florida FBI Supervisor Swinney about the "Schipani" procedure regarding the Florida logs, which, upon request from the Department of Justice in Washington, Swinney forwarded to the latter agency (S.M. July 11, 1967, pp. 55-56, 61, 95-99).

port. The Georgia "Schipani" material is said by the Government to have originated with the Federal Narcotics Bureau District 6, covering the latter State. But we have not been told how any one in District 6 was able to produce the present "Schipani" information to the effect that the Georgia car-bug did not work. And when we tried, repeatedly, to probe this question of how District 6 obtained or assembled the information, we were blocked by rulings of the Court below (e.g. S.M. July 25, 1967, pp. 45-50). We especially invite this Court's attention to the testimony just cited, as endowing with a kind of "out of this world" character the evasions of the Government (supported by the rulings of the Court below) when we tried to probe the question of how there could be a probatively worthwhile District 6 "Schipani" report assuring that the Georgia car-bug did not work, when no Government witness in this hearing (and no other Government proof herein) reached the topic of what factual basis District 6 had to support the making of this assurance, it being insisted by the Government that no contemporaneous writings on the subject had ever been made. Again, we especially urge this Court to scrutinize this vital feature of the case, with a view to asking why there is literally no proof in this record of any kind, oral or written, to substantiate District 6's post-factum, conclusory and self-serving assurance that the Georgia car-bug did not work. At least, had someone from District 6 with knowledge of this matter been produced as a witness by the Government, we could have interrogated such person as to just what conferences or office inquiries had transpired in District 6 which had led to District 6's "Schipani" report. It is incomprehensible that the Govern-

ment has made no attempt to cope with this problem in the within hearing, except on the theory that a plenary inquiry would be undesirable from the Government's standpoint; and it is altogether incomprehensible that the Court below should have indulged the Government in this blatant obstruction of effective constitutional inquiry.

In light of the above described probative breakdown on the ultimate question of the truthfulness of the Narcotics Bureau's claims that the Georgia car-bug did not work, we addressed to the Court below, at the July 25 session, the following request (S.M. 53):

> "Mr. Glasser: I spent 11 years in the government service making plenary surveys for Cabinet officers of various federal matters for report to Congress, the White House and so on.
>
> As a lawyer I know that a plenary documentary survey could be made in this case to reveal actually the total file picture from which then an observer could determine, in a detective spirit, whether we have been given the total file picture by the government down to this time in regards to Narcotics Bureau files.
>
> I hereby request that such a total file survey be made, presented to this court for initial scrutiny with a view to then being turned over to the defense attorneys."

Narcotics Agent Leonard S. Schrier testified on July 25, after Agent Matuozzi (S.M. 55 *et seq.*). Schrier knew of no reports (other than the "Schipani" material) concerning the Georgia car-bug (S.M. 64-67). Although he was ap-

parently group leader of the narcotics agents assigned to this case (S.M. 56-57), he first heard of the Georgia car-bugging in connection with the "Schipani" developments and the defense was prevented from probing further into this topic (S.M. 67-68).

At the conclusion of this unsatisfying testimony of Agent Schrier on July 25, we repeated our request for a plenary survey of the Government's files (S.M. 68), the Court reserving decision.

Thereafter on July 25, 1967, Narcotics Agents Francis Waters and Frank Selvaggi testified. We shall not here repeat our description of their testimony which appears in DB 16-17, filed herewith.

What we wish to note here concerning the testimony of the latter two narcotics agents is that it imported into this record an apparently grave breach of credibility by Agent Waters, who had been one of the key investigation agents in the Georgia situation in December 1965. Waters testified in this hearing that although he had inquired of Motel manager Brown as to who was the occupant of Room 108 (Desist's room) (as Brown himself had testified—*supra*), Waters had never asked Brown for the key to Desist's room and had never entered that room (S.M. July 25, 1967, pp. 78-79, 81).

However, when Agent Selvaggi took the stand, after Waters' testimony (and Waters having left the courtroom), Selvaggi testified that one of the Motel managers, a man with white hair (evidently Mr. Brown), gave Agent Waters, in the presence of Selvaggi, a key to Room 108, but Selvaggi claimed they did not use the key (S.M. 107-108); Waters

evidently kept the key, however, for a considerable time (S.M. 109).

On hearing this testimony of Selvaggi, we recalled Agent Waters to the stand. We wish that this Court could have seen for itself the evidences of crafty rumination which flitted rapidly over the physiognomy of Agent Waters when we now asked him whether at any time he had had in his possession a key to Desist's Motel room in Columbus, Georgia; exercising really quite impressive self-control as an apparent past-master in the art of feigning composure when confronted with sudden testimonial emergencies, Agent Waters, after a discreet pause, answered that he did have a key; the key was given to him by Mr. Brown; then, composure fully re-achieved (aided by one of those classic witness-rescue interruptions by Government counsel) Waters answered with urbanity, almost with boredom, further questions as to how long he had had the key, and whether he had used it (claiming, of course, that he had not used the key) (S.M. 113-117). See, again, Brown's testimony *supra,* that Waters had come back after receiving the key, and had said to Brown (referring to Desist), "he is the man". Waters admitted that he may have told Brown this in effect (S.M. 115-116).

Not the least interesting thing about the above described Waters-Selvaggi credibility fiasco in regard to the Desist motel room key, is that the Court below has made no mention whatever of this item in its opinion and report—where, however, the forthrightness and persuasiveness of all of the Narcotics Agents who testified in this hearing are hailed by the Court below in terms of warmest encomium.

Appendix D—Appellants' Brief Re Electronic Eavesdrop

At the conclusion of the hearing on July 25, 1967, we renewed our requests for continuation and enlargement of the hearing, which the Court denied, but not without some expression of its dissatisfaction as to the posture of the record (S.M. 122-129—see especially 126-127).*

ARGUMENT

I. Introductory

The one conclusion, in regard to the hearing below, on which both sides and the Court below may agree, is that—except for the testimony of our witnesses Messrs. Brown and Kennington—the hearing record has produced no proof of unconstitutional electronic evidentiary taint affecting the cases of the present defendants-appellants. While we do urge that the testimony of Messrs. Brown and Kennington has significance (*infra*) notwithstanding the District Court's rejection of the credibility of their testimony, our main point now before this Court, upon the return of the remand proceeding, is that the Government and the District Court unconstitutionally foiled this Court's orders of remand; and while it would be intellectually and legally unjustified on our part to claim affirmatively that we would surely have proved unconstitutional taint in the remand proceedings below if the foiling had not occurred, we respectfully contend that there is more than enough in the record of these cases as a whole to justify us in now arguing that the foiling must be redressed by either a re-

* At p. 127 of the minutes of July 25, seventeenth line, the word "politeness" should read "obliqueness".

newed order of remand directing the Court below to conduct a proper constitutional hearing, or by this Court's itself undertaking the task of *de novo* evidentiary hearing in order to vindicate the constitutional requirements which are applicable here.

Respectfully, it seems to us that it is by no means out of the question, as a matter of constitutional procedure and appropriate and needful judicial administration in the circumstances here presented, for this Court to undertake its own *de novo* evidentiary examination. Such would be in accordance with the real constitutional spirit of the "Schipani" *et post* decisions of the Supreme Court. It would also be in accordance with the doctrines which govern appellate review of issues of "constitutional fact" on a *de novo* basis. Furthermore, from the formal jurisdictional standpoint, it would be justified, we submit, as an exercise of this Court's powers under the "All Writs" statute, 28 U.S.C. § 1651. Finally, it would fall also within the conventional powers of this Appellate Court to supervise and monitor the decency of the administration of Federal criminal justice.

Nor would such a *de novo* evidentiary undertaking by this Court be prohibitively time-consuming, at least so far as our own proposed subject matter would engage this Court's consideration in such a *de novo* procedure. To a large extent, at least as concerns the portions of the record below consisting of the Government's proofs (those proofs comprising by far the bulk of the record), such a *de novo* evidentiary hearing by this Court could be, in the familiar sense, a *de novo* hearing "on the record"—so far as the defendants-appellants are concerned. The only exceptions

which we would urge as regards such *de novo* "review on the record" would be with respect to the following:

(1) We would ask that this Court hear *de novo* the testimony of our witnesses Messrs. Brown and Kennington. We must say that we find dismaying the credibility evaluation by the Court below concerning these two witnesses. We would want this Court to see and to hear Messrs. Brown and Kennington in person. Brown, we submit, was an altogether convincing witness. Indeed it seemed to us that Brown displayed in a classic way the finest "old-fashioned" American qualities on the witness stand, qualities of forthrightness and of a doughtiness that were exceptionally impressive. As for Kennington, it is true that he wavered in his testimony, but the man obviously was not lying, and we would want this Court to test his performance for itself. As we above said, the District Court's flat rejection of the credibility of these two gentlemen is dismaying. What should a reviewing Tribunal do in such a situation where, again, the reviewing Tribunal has its own "Schipani" obligations, its own "constitutional fact" obligations, and its own obligations to monitor the constitutional decency of Federal criminal justice; and, also, where the reviewing Tribunal is expressly besought, as here, to exercise its jurisdiction under the "All Writs" Statute (*supra*)? We would not be so presumptuous as to contend (as though the answer to the latter question were conventionally obvious) that this Court has no choice but to adopt our suggestion for a *de novo* evidentiary hearing before this Court. We recognize that what we are asking this Court to do in that regard is not only unusual, it is unique to our knowl-

edge. But we are asking this Court to do it, because we think that the needs of constitutional justice in the present circumstances so require, irrespective of definable "precedent." At the same time, it should be borne in mind that this suggestion of ours for a *de novo* evidentiary hearing by this Court is but one of the two alternatives which we are here urging. The other alternative, as above said, is that the matter be remanded anew to the District Court for a proper further hearing.

(2) In the event of this Court's acceding to our request for a *de novo* evidentiary hearing before this Court itself, the only other witnesses from the record below whom we would request this Court to hear would be Narcotic Agents Matuozzi, Waters, Selvaggi and Fitzgerald; and Assistant United States Attorney Tendy. We would want this Court to hear those witnesses so that the Court might apply its own powers of testimonial elicitation to explore in the needed way the question of the truthfulness of the assertions of the Narcotics Bureau witnesses that the Georgia car-bug did not work, and that the "Schipani" documentation relating to that topic is probatively satisfactory in terms of the "lower echelon" bases of that documentation (a matter which the present record has not reached at all, as we previously showed). And we would want Mr. Tendy back on the stand before this Court itself so that the facts could be elicited as regards Mr. Tendy's conversation with Agent Fitzgerald in the pre-trial proceedings before Judge Palmieri on the motion for suppression of the Waldorf Astoria eavesdropping (we refer to the unrecorded conversation in the latter pre-trial proceeding between Mr.

Tendy and Agent Fitzgerald which resulted in informing Judge Palmieri that there had been no other electronic surveillance).

(3) In the event of either a *de novo* evidentiary hearing before this Court itself, or of a remand anew to the District Court, we would of course also urge that a plenary evidentiary exploration of the instant electronic issues be made, and that the Government be required to produce all of the necessary witnesses and all of the necessary documentation from the Government's files. If we may presume to do so, we would suggest that, in order to relieve this Court of the burdensomeness of such latter evidentiary procedures, this Court might see fit to assign to the District Court the plenary supplemental phase of the evidentiary hearing referred to in this paragraph, while reserving for itself the *de novo* reception of the testimony of our witnesses Brown and Kennington and of the Government witnesses mentioned in paragraph (2) above.

In the Court below we urged (DB 21-22) that, considering the posture of the record in that Court after the testimony of Brown and Kennington had been received, the credibility issue as to those witnesses was not whether the Court could conclude that their testimony had the requisite probative force to establish, as a matter of the ultimate merits of the case, that unconstitutional taint had occurred. Rather, we urged in the Court below (*ibid*) that the credibility issue at that juncture was whether, through Brown and Kennington, we had adduced sufficient indication of such taint to justify allowing the defendants a further opportunity for the plenary hearing which they were request-

ing in view of the Government's having rested its case when it did. In its opinion and report herein (p. 10), the District Court referred to this contention of ours as being "more pettifogging than persuasive". May we respectfully suggest that the District Court was being more alliterative than alert. At least it is within this Court's province, under its power and duty of *de novo* review of "constitutional facts", to determine that Brown's and Kennington's testimony was not *so unarguably* devoid of credibility as to justify the District Court in torpedoing our further opportunity to explore the electronic issues after the Government, by resting its case when it did, had created the grotesque procedural roadblock previously described.

II

Further as to the Burden of Going Forward

From a reading of the opinion and report of the Court below in which the topic stated in the above heading is treated by that Court, we receive the impression that the Court below may well have over-simplified the principal decision of the Supreme Court as to the nature and the extent of the burden which must be met by a defendant in a criminal case who challenges illegally obtained electronic evidence. At p. 12 of its opinion and report the Court below has set forth what purports to be a quotation from the second *Nardone* case (*Nardone* v. *United States,* 308 U.S. 338, 341-342), relating to this question. When we perceived that the purported quotation from *Nardone* seemed to be textually garbled, we examined the Supreme Court opinion, and

we must now point out that the Court below did apparently misconceive (through evidently unintentional misquotation) the *Nardone* language. The actual language of the Supreme Court in the second *Nardone* case (*supra*) was far from laying down any such explicit standard as the Court below thought, to the effect that the challenging party must satisfy the trial Court not only as to the *use* of illegal electronic surveillance, but also as to the "solidity" of the claims of taint, before the Government may be required to make plenary disclosure. The actual, correctly quoted entirety of the pertinent portion of the language in the second *Nardone* case appears at 308 U.S. 341-342, following a reference by the Supreme Court to the broad constitutional rule which it was there laying down that derivative and not only direct evidentiary use of forbidden electronic surveillance is banned:—

> "In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation—fair to the intendment of §605, but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a sub-

stantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

Dispatch in the trial of criminal causes is essential in bringing crime to book. Therefore, timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the Government in obtaining testimony. To interrupt the course of the trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention. Like mischief would result were tenuous claims sufficient to justify the trial court's indulgence of inquiry into legitimacy of evidence in the Government's possession. So to read a congressional prohibition against the availability of certain evidence would be to subordinate the need for rigorous administration of justice to undue solicitude for potential and, it is to be hoped, abnormal disobedience of the law by the law's officers. Therefore claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity and not be merely a means of eliciting what is in the Government's possession before its submission to the jury. And if such claim is made after the trial is under way, the judge must likewise be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim. The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here

indicated, rely on the learning, good sense, fairness and courage of federal trial judges."

It may fairly be said that there were two focal points in the remand hearing below when, as we contend, the District Court went constitutionally astray in its procedural and evidentiary evaluation of the record, i.e., when the Court below failed to perceive correctly that the defendants' offers of proof or evidentiary showings merited reshifting the burden of going forward upon the Government (which had so abruptly and, we claim, prematurely, rested its case). These two focal stages occurred (1) when we submitted to the Court below our Exhibit B for identification, which was our statement of relevancy or offer of proof in support of our request for the witnesses named in our Exhibit A for Identification (Exhibit B, as previously stated, is annexed as an exhibit to this brief); and (2) when the District Court made its flat rejection of the credibility of our witnesses Brown and Kennington. The letter item has been sufficiently discussed heretofore; we now address ourselves further to the District Court's treatment of our aforementioned Exhibit B.

Our Exhibit B was submitted to the Court below at a stage (July 11) when we had not yet completed our independent investigation. On page 4 of Exhibit B (photocopy in appendix, *infra*) we enumerated six items of investigative information which we then believed we had. As will appear, the only ones of those six items as to which we were ultimately able to introduce evidence in this hearing—we did introduce evidence as to a seventh item, the Georgia car "bug" mentioned earlier in Ex. B (pp. 2-3)—were item "(1)" relating to illegal auditing of a telephone conversa-

tion from Georgia, and item "(3)" relating to a trespassory entry and search in Georgia. As to the other four items we did—we may now represent to this Court—have information at the time. And, at the time of our submission of Exhibit B to the Court below, we hoped to substantiate our information from testimony of the witnesses requested in our Exhibit A. As to our Exhibit B item numbered "(2)", *re* telephone wire tapping in France, we hereby represent that we had information from defendant Le Franc, but we were never able to undertake the cost of the necessary investigation in France; we had hoped to substantiate this item *via* United States Army witnesses listed in our Exhibit A. As to the Exhibit B item "(4)", *re* trespassory entry and search in New York City, we hereby represent that we had information to such effect from appellant Desist, relating to his room at the Dixie Hotel in New York City in December 1965, but we were ultimately unable to undertake the financial cost of further investigating this item. As to our Exhibit B item "(5)", *re* use of an electronic device in auditing a Georgia conversation which had allegedly been audited non-electronically, this referred to the alleged Desist-Conder conversation at the Black Angus Restaurant in December, 1965, as to which we had information indicating that from the physical facts the alleged conversation could not have been audited non-electronically; but ultimately our investigator in Georgia informed us that he had been unable to obtain any probative information on this subject; we represent, however, that at the time of our submission of Exhibit B in the Court below we thought in good faith that this item had a realistic chance of being proved. As to our Exhibit B item "(6)",

re extensive additional electronic surveillance in Europe and in this country, we represent that our Georgia investigator had informed us that he had been so advised by United States Army personnel, who in turn had suggested that further information would be obtainable from Army files and Army officers, hence the inclusion in our Exhibit A of the Army individuals there mentioned as requested witnesses.

Our thought in making the representations in the preceding paragraph is not to try to influence this Court by improper "off-the-record" matters. Our thought, rather, is that, as suggested earlier herein, the large interests of constitutional justice which we take it must dominate the present "Schipani" type of judicial inquiry, justify us in making the foregoing representations to this Court, even though we did not consider it feasible, as attorneys endeavoring to serve in a proper professional manner the interests of our clients, to import these matters into the record before the Court below.

Continuing this latter theme, we venture the following further suggestions, well realizing their delicacy and difficulty: Facing below as we did what appeared to us the extraordinary and almost incomprehensible obduracy of the Government in this entire electronic search controversy in this case, and facing also what likewise appeared to us to be the non-receptiveness towards the defendants' efforts on the part of the Court below in the course of the recent hearing, we may now frankly state to this Court that we (defense counsel) arrived at the deliberate professional policy judgment that, for the sake of our defendants, commencing around the end of the hearing session of June 26, we must

guard "with eagles' eyes" against any possible professional-strategic ingenuousness on our part lest we find ourselves offering up our essential legal and factual positions as mere sacrificial offerings. If we may vary the metaphor, a stage was reached in the proceedings below when, in the light of the entire record of this prosecution, counsel for the appellants concluded that the situation in the remand hearing below was apparently hopeless regardless of the apparent merits, and that perhaps our best course would be to give no more hostages to fortune.

All of this, we perfectly well realize, would have been perhaps subject to criticism as unlawyer-like on our part, but for one previously mentioned axiom of the constitutional law of this country which was (and still is) very much in our thoughts as lawyers in this case, namely, that when issues of "constitutional fact" are involved in a criminal prosecution there operates or may operate the great residual, monitory power of the Appellate Tribunals, a power of literally *de novo* review. Furthermore, in the constitutionally novel framework of the "Schipani" type of review here involved, where Fourth Amendment privacy values coalesce with constitutional due process values and with the values embodied in the doctrine of judicial supervision of the administration of Federal criminal justice, we (defense counsel) felt entitled to make the grave policy decisions above intimated whereby our choice became one of retrenching the apparently futile further efforts along constitutional lines in the Court below and to hazard the fate of our constitutional contentions until the later day when, we knew, we would be coming back before this Appellate Court.

We cannot overstate our keen realization of the understatement that the foregoing rationale of our professional policy choices herein is unconventional. But we are dealing here with an unconventional problem, namely, the problem of how conscientious attorneys in a criminal proceeding should try to carry out their duty to their clients when they are convinced that they and their clients face an apparent thwarting of constitutional justice at a particular stage of the proceedings. We hasten to add that we intend no imputation whatever against the integrity of the Court below in what we are here saying. The pressures of a case like this one, and the consequences of those pressures, are entirely understandable without one's having to resort to unworthy imputations, and we hereby unhesitatingly and unqualifiedly disavow any such imputations. The legal and constitutional issues persist, however, and it is solely in terms of those issues that we are here speaking. Our respectful disagreement with the Court below, then, as is true also of our above statements that we came to view those disagreements as irreconcilable in the proceedings below, are intended as such and no more, i.e., they are intended as nothing beyond conscientious expressions of professional disagreements by attorneys faced with a judicial view to which they not only have been unable to subscribe but against which they have believed it necessary to guard their clients by the policy decisions above suggested and in the light of the doctrine of *de novo* review of issues of "constitutional fact".

III.

The Impact On This Case Of *Berger* v. *New York*, — U.S. —, 18 L. Ed. 2d 1040

Although this Court's order of remand for further electronic review expressly excluded the Waldorf eavesdropping, we consider it proper to call the Court's attention to the above cited *Berger* decision, which we read as embodying a constitutional condemnation of "electronic search" so sweeping—unless full Fourth Amendment standards are obeyed—that the Waldorf-Astoria electronic surveillance herein must be disapproved.

IV.

The Impact On This Case Of The Granting Of Certiorari In *Katz* v. *United States*, U.S. S. Ct., October Term 1966 No. 895.

Again, although the Waldorf-Astoria eavesdropping was excluded from the remand order herein, the action of the Supreme Court in the *Katz* case, *supra*, may decisively affect these appeals. As stated in 35 U.S. Law Week 3322, one of the certiorari issues in the *Katz* case is, "Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution".

V.

Adoption Of Points Urged In The Defendants-Appellants' Brief In The Court Below, And Connoted In The Within Summary Of The Proceedings And Testimony Below.

For brevity, we hereby respectfully adopt and we herein urge all of the points of argument or contention which are presented in DB 1-25, copies annexed hereto; and in all prior pages of this brief, including those portions of our factual summary *supra* where we make presentation by way of contention.

Conclusion

It is respectfully submitted that the procedural relief alternatively requested under "I" of the Argument in this brief *viz.*, that this Court should either remand the case anew to the District Court for a proper constitutional hearing, or that it should itself conduct such hearing, or that it should combine and divide such further hearing functions as between itself and the District Court—should be granted.

Respectfully submitted,

Irving Younger
Attorney for Defendant-Appellant Samuel Desist

Abraham Glasser
Attorney for Defendants-Appellants, Frank Dioguardi and Anthony Sutera

David Markowitz
Attorney for Defendant-Appellant, Jean Claude LeFranc

Arnold C. Stream
Attorney for Defendant-Appellant, Jean Nebbia

APPENDIX E

Defendants' Exhibits A and B In Remand Hearing In District Court Re Electronic Eavesdrop Issues

Defendants' Exhibit A

July 6, 1967

U.S.A. v. DESIST ET AL, U.S. CT. APP., 2ND CIR., DOCKET NO. 30849, ON REMAND BEFORE HON. EDMUND L. PALMIERI, U.S.D.J.

TENTATIVE LIST OF WITNESSES FOR DEFENDANTS

Narcotics Bureau Agent Fitzgerald
" " " Kiere
" " " Norris M. Durham
" " " Walter J. Smith
" " " Klempner (Joseph T.)
Ex- " " " Weinberg (Jerome M.)
" " " Leonard S. Schrier
" " " Peter Gruden
" " " Lee Hughes
" " " Jessup
" " " John E. Thompson
" " " Francis E. Waters
" " " Dugan
" " " Selvaggi
" " " Adaneski
" " " Matuozzi
" " " Rice
" " Official or Agent who was in direct or immediate charge of the activities of the foregoing agents in this case.

United States Customs Service Port Investgator Paul Boulad

Appendix E—Defendants' Remand Exhibits

Assistant United States Attorney William M. Tendy

FBI Agent Stadtmiller

FBI Agent or Clerk ..... (Supervisor of FBI Clerks Dougherty, Moseley and Bonner, Miami, Florida)

FBI Agent or Official who was in charge of the Miami office for all years 1962-1965 inclusive.

FBI Official from National Office in Washington, D.C. who would have authoritative knowledge of overall FBI procedures re electronic surveillance for all years 1962-1965 inclusive.

Narcotics Bureau Agent or Official who would have such overall knowledge re Narcotics Bureau electronic surveillance for said years.

U.S. Army Commanding General Fort Holiburg, Maryland, or Chief File Clerk or Record Clerk or other officer or official having charge of C.I.C. (Counter Intelligence Corps) or C.I.D. (Criminal Investigation Division) re Desist, Conder et al. during all herein operative times.

Same as last preceding item In Re appropriate officer or official at Fort Gordon, Georgia, Fort Benning, Georgia, Fort Bragg, North Carolina, and U.S. Army E.T.O. comprising Orleans (France) Depot.

Fred W. Ratteree, Avis Car Rental, Columbus, Georgia

H. C. Pair, Manager of Waldorf Motel, Atlanta, Georgia

E. Warren Whiteman, Credit Manager, Waldorf-Astoria Hotel, New York, N. Y.

FBI Agent or Clerk Edward E. Fleck—Miami

FBI " " " Mullena (? sp.)—Miami

Georgia Police Officer Hollis Baker, and entire supervisory echelon plus entire subordinate echelon re Officer Baker.

It is respectfully emphasized that the above list is tentative.

It is also respectfully noted that production of records or other documents In Re any or all of the above listed persons will or may be requested, by subpoena duces tecum if necessary.

Defendants' Exhibit B in Remand Hearing

July 11, 1967

U.S.A. v. DESIST ET AL., U.S. CT. APP., 2ND CIR., DOCKET NO. 30849, ON REMAND BEFORE HON. EDMUND L. PALMIERI, U.S.D.J.

* * * * *

STATEMENT FOR DEFENDANTS EXPLAINING RELEVANCY OF TESTIMONY SOUGHT FROM WITNESSES LISTED IN "TENTATIVE LIST OF WITNESSES FOR DEFENDANTS" DATED JULY 6, 1967.

This statement of relevancy is expected to be supplemented by oral presentation of counsel in the hearing before Judge Palmieri on July 11, 1967, or by subsequent written or oral presentation prior to July 18, 1967. Defendants also respectfully reserve the right to offer a statement of relevancy as to the testimony of witnesses not listed in the typewritten "tentative list" dated July 6, 1967.

Certain general preliminary observations seem to be appropriate on the issues of relevancy herein, and indeed on the overall procedural issues of this remand proceeding.

First, we are aware that Judge Palmieri is concerned lest our efforts be heading towards what His Honor characterized on July 6, 1967 as "a grandiose fishing expedition". Some "fishing" methods have been forced upon us by the Government's election to rest its case after calling only FBI clerical witnesses from Miami, Florida, and one Narcotics Bureau witness (Mr. Kiere) whose direct testimony was limited to the question of audibility of the conversations in the Avis Rental car in Georgia. The Govern-

ment's decision to rest at that juncture, taken together with our own repeated prior announcements that we would be handicapped in cross examining Government witnesses and in presenting our own proofs until after completion of our own investigation, gives rise to a situation which at the present moment seems to be basically repugnant to the "Schipani" review concept and to the orders of the Court of Appeals. We view the "Schipani" procedure as placing a duty on the Government to make plenary disclosure, *a fortiori* when a hearing of the present type is underway.

Second, specifically as to the admitted "bugging" of the Avis car, the Government's election to rest at the stage when it did has deprived Judge Palmieri, the Court of Appeals, and the defendants of direct proof by the Government as to any details of the method and agency of the "bugging" of that car. It is not enough that the Government has admitted the "bugging" of the car was trespassory. The case bristles with unanswered questions on this subject; perhaps the foremost such unanswered question is that of Agent Kiere's credibility in testifying that the Avis car "bug" did not function audibly; it is indispensable, for a further adequate exploration of this question, that the fullest possible picture be developed as to the agency and technical method of the "bug" with a view to eliciting why it did not work, if in truth it did not work. For these reasons alone, without more, we contend it is necessary to have the testimony of all of the Government agents and other persons who may be in a position to reveal the entirety of the circumstances of the Avis car "bug".

Furthermore, the defense counsel are now in a position to be able to represent that we have information that the Avis car "bug" did work. Our need and our desire, then, to explore this topic through the avenue of a seemingly unavoidable "fishing" interrogation of numerous persons, are not in fact motivated by mere "fishing" curiosity, but by a good faith need and desire to *confirm* the information just mentioned.

With the above preliminary observations in mind, we offer further suggestions of relevancy as follows:

The amended order of the Court of Appeals, in allowing us to explore without limit (except as to the Waldorf-Astoria subject matter previously explored) the question of whether any Governmental personnel engaged in any other electronic eavesdropping of any kind which related to this case, has inevitably imported into this remand hearing some degree of "fishing". Had the Government not rested its case when it did, and had the presentation of all of the Government's proof (in a plenary and unstinting manner) been deferred as we requested until after completion of our own investigation, much of our "fishing" could have been avoided through affording to us instead more adequate avenues *via* cross examination of witnesses called by the Government.

In any event, our exploration along the broader lines allowed by the Court of Appeals in regard to any other electronic eavesdropping, does not depend even at this moment on mere unsupported "fishing" curiosity. Defense counsel are now in a position to represent that we have

information as follows:—(1) Telephone conversations of at least one of the defendants were illegally audited at a relevant time in Georgia. (2) Telephone conversations of at least one of the defendants were audited, in a manner which would be illegal under American law, at a relevant time in France. (3) A trespassory entry and search were made in private premises of at least one of the defendants at a relevant time in Georgia, indeed at a time and place in Georgia of such prime and probably dispositive relevancy as to make it urgently necessary to inquire in the most full manner whether said trespassory entry and search had relation also to installation or use of a "room bug". (4) In all probability there occurred a similar trespassory entry and search in the private premises of at least one defendant at a relevant time in New York City. (5) In all probability an alleged non-electronic auditing of another conversation of at least one defendant at a relevant time in Georgia was done with aid of an electronic device. (6) From witnesses whom, unfortunately, we may not be able to subpoena, it has been learned that electronic surveillance was massively and pervasively resorted to both in Europe and in this country practically from the inception of the alleged narcotics conspiracy.

In the light of the items enumerated in our last preceding paragraph—as to all of whcih, we repeat, defense counsel hereby represents that we are already in possession of concrete and distinct information—it is respectfully urged that each and every one of the persons or sources listed in our typewritten "tentative list" of July 6, 1967

ought to be brought to the attention of Judge Palmieri and the Court of Appeals.

Respectfully submitted,

ARNOLD C. STREAM
IRVING YOUNGER
DAVID M. MARKOWITZ
ABRAHAM GLASSER
Counsel for Respective Defendants